No. 15-497

Title:	Stacy Fry, et vir, as Next Friends of Minor E. F., Petitioners
	v.
	Napoleon Community Schools, et al.
Docketed:	October 19, 2015
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(14-1137)
Decision Date:	June 12, 2015
Rehearing Denied:	August 5, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Oct 15 2015	Petition for a writ of certiorari filed. (Response due November 18, 2015)
Nov 5 2015	Order extending time to file response to petition to and including December 18, 2015.
Dec 18 2015	Brief of respondents Napoleon Community Schools, et al. in opposition filed.
Dec 23 2015	Reply of petitioners Stacy Fry, et vir, as next friends of minor E. F. filed.
Dec 30 2015	DISTRIBUTED for Conference of January 15, 2016.
Jan 19 2016	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 20 2016	Brief amicus curiae of United States filed.
May 31 2016	Supplemental brief of respondents Napoleon Community Schools, et al. filed.
May 31 2016	Supplemental brief of petitioners Stacy Fry, et vir, as next friends of minor E. F. filed.
Jun 7 2016	DISTRIBUTED for Conference of June 23, 2016.
Jun 27 2016	DISTRIBUTED for Conference of June 27, 2016.
Jun 28 2016	Petition GRANTED.
Jul 27 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 22, 2016.
Jul 27 2016	The time to file respondents' brief on the merits is extended to and including September 30, 2016.
Aug 2 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 2 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, from counsel for the petitioners.
Aug 22 2016	Joint appendix filed.
Aug 22 2016	Brief of petitioners Stacy Fry, et vir, as Next Friends of Minor E. F. filed.
Aug 26 2016	Brief amici curiae of Psychiatric Service Dog Partners, Inc., et al. filed.
Aug 29 2016	Brief amicus curiae of United States filed.
Aug 29 2016	Brief amici curiae of National Disability Rights Network, et al. filed.
Aug 29 2016	Brief amici curiae of Professor Thomas Hehir, et al. filed.
Aug 29 2016	Brief amici curiae of Council of Parent Attorneys and Advocates, et al. filed.
Aug 29 2016	Brief amicus curiae of Hon. Lowell P. Weicker, Jr. filed.

Aug 29 2016	Brief amici curiae of Illinois and Minnesota filed.
Aug 29 2016	Brief amicus curiae of Autism Speaks filed.
Sep 2 2016	SET FOR ARGUMENT On Monday, October 31, 2016
Sep 9 2016	Record has been requested from the U.S.C.A. 6th Circuit.
Sep 20 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 28 2016	CIRCULATED
Sep 30 2016	Brief of respondents Napoleon Community Schools, et al. filed. (Distributed)
Oct 7 2016	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Oct 17 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 20 2016	Reply of petitioners Stacy Fry, et vir, as Next Friends of Minor E. F. filed. (Distributed)
Oct 31 2016	Argued. For petitioners: Samuel R. Bagenstos, Ann Arbor, Mich.; and Roman Martinez, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Neal K. Katyal, Washington, D. C.
Feb 22 2017	Judgment VACATED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment, in which Thomas, J., joined.
Mar 27 2017	JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioners:		
Samuel R. Bagenstos Counsel of Record	American Civil Liberties Union Fund of MI 625 South State Street Ann Arbor, MI 48109 sbagen@gmail.com	(734) 647-7584
Party name: Stacy Fry, et vir, as Next Friends of Minor E. F.		
Attorneys for Respondents:		
Neal Kumar Katyal Counsel of Record	Hogan Lovells US LLP 555 Thirteenth Street, N.W. Washington, DC 20004 neal.katyal@hoganlovells.com	(202) 637-5600
Party name: Napoleon Community Schools, et al.		
Kenneth B. Chapie	Giarmarco, Mullins & Horton, P.C. Tenth Floor Columbia Center 101 West Big Beaver Road Troy, MI 48084-5280	
Party name: Napoleon Community Schools, et al.		
Timothy J. Mullins	Giarmarco, Mullins & Horton, P. C. 101 W. Big Beaver Road 10th Floor Troy, MI 48084-5280 tmullins@gmhlaw.com	(248) 457-7000
Party name: Napoleon Community Schools, et al.		

Other:

Thomas B. Allen
Frost Brown Todd LLC
9277 Centre Pointe Dr.
Suite 300
West Chester, OH 45069
tallen@fbtlaw.com
(513) 870-8200

Party name: National School Boards Association, et al.

Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates
P.O. Box 6767
Towson, MD 21285
selene@copaa.org
(844) 426-7224

Party name: Council of Parent Attorneys and Advocates, et al.

John J. Ensminger
4228 Atwood Road
P.O. Box 675
Stone Ridge, NY 12484
jensminger@msn.com
(917) 613-4960

Party name: Psychiatric Service Dog Partners, Inc., et al.

Noel J. Francisco
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
SupremeCtBriefs@USDOJ.gov
(202) 514-2217

Party name: United States

David L. Franklin
Solicitor General
100 West Randolph Street
Chicago, IL 60601
dranklin@atg.state.il.us
(312) 814-5376

Party name: Illinois and Minnesota

Paul Richard Genender
Weil Gotshal & Manges LLP
200 Crescent Court, Suite 300
Dallas, TX 75201
paul.genender@weil.com
(214) 746-7877

Party name: Law Professors

Roman Martinez
Assistant to the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 514-2201

Party name: United States

Gary S. Mayerson
Mayerson & Associates
330 W. 38th Street, Suite 600
New York, NY 10018
gary@mayerslaw.com
(212) 265-7200

Party name: Autism Speaks

Aaron M. Panner
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036-3215
apanner@kellogghansen.com
(202) 326-7900

Party name: Professor Thomas Hehir, et al.

Sasha Samberg-Champion
Relman, Dane & Colfax, PLLC
1225 19th Street, NW, Ste. 600
Washington, DC 20036
ssamberg-champion@relmanlaw.com
(202) 728-1888

Party name: Hon. Lowell P. Weicker, Jr.

Tauna Marie Szymanski
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
tszymanski@hunton.com
(202) 955-1949

Party name: National Disability Rights, et al.

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No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Becker Gallagher · Cincinnati, OH Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

> Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages—a remedy that is not available under the IDEA.

PARTIES TO THE PROCEEDING

Stacy Fry and Brent Fry, as next friends of minor E.F., were plaintiffs-appellants in the proceedings below.

Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes were defendants-appellees in the proceedings below

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The opinion of the court of appeals is reported at 788 F.3d 622 and is reprinted in the appendix (App.) at 1. The opinion of the district court is reported at 2014 WL 106624. It is reprinted at App. 7

JURISDICTION

The court of appeals entered judgment on June 12, 2015, and denied rehearing en banc on August 5, 2015. App. 53. The petition is filed within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Rehabilitation Act of 1973, the Handicapped Children's Protection Act of 1986, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at App. 55.

STATEMENT OF THE CASE

This case involves interpretation of the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), which requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. Petitioners brought this case under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to seek damages for the social and

emotional harm caused by the Defendant school district's refusal to permit E.F 's trained service dog to accompany her to school.

A. The Facts

E.F was born with cerebral palsy; her condition significantly limits her motor skills and mobility, but it imposes no cognitive impairment. Cplt. ¶ 2.[1] In 2009, when she was five years old, E.F obtained a service dog prescribed by her pediatrician to help her live as independently as possible. *Id.* ¶ 3. The dog, a Goldendoodle named "Wonder," was certified and trained to help E.F with mobility and to assist her in daily activities, such as retrieving dropped items, opening and closing doors, turning on and off lights, and taking her coat off. *Id.* E.F 's pediatrician and family intended to have Wonder accompany E.F at all times to facilitate her independence and to ensure that she and Wonder would bond after training. *Id.* ¶ 4.

Respondents Napoleon Community Schools and Jackson County Intermediate School District (collectively. the School District) refused to permit E.F. to attend school with her service dog. *Id.* ¶¶ 4-5. The School District reasoned that E.F 's Individualized Education Program (IEP) already provided for a human aide to provide one-on-one support, and "Wonder would not be able to provide any support the human aide could not provide." App. 4. As a result, E.F was forced to attend school without her prescribed service dog

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[1] Because the lower courts resolved this case on a motion to dismiss, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

from October 2009 to April 2010. Cplt. ¶ 5. After her attorneys met with the School District's counsel, E.F. was permitted to bring the dog to school on a "trial" basis until the end of the school year. *Id.* During that trial period, however, the school required the dog to remain in the back of the room during classes, forbade the dog from assisting E.F with many tasks he had been specifically trained to do, and banned the dog from accompanying and assisting her during recess, lunch, computer lab, library time and other activities. *Id.* After the trial period, the School District refused to permit Wonder to accompany E.F to school. *Id.* ¶ 6.

B. Statutory Background

Congress enacted the HCPA in response to *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court held that the Education for the Handicapped Act (the prior name for the IDEA) provided "the exclusive avenue" for students with disabilities to assert an educational-rights claim—even if that claim arose under some other federal statute or even the Constitution itself. See *id.* at 1012-1013. Congress responded swiftly to "reaffirm[] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with EHA as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 6 (1985).

In service of that goal, the HCPA amended the IDEA specifically to preserve educational-rights claims under the Constitution and other federal laws. In its current form, the relevant section of the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws **seeking relief that is also available under this subchapter**, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). This provision expressly preserves non-IDEA claims for the educational rights of children with disabilities, but it requires that, where a plaintiff "seek[s] relief that is also available under" the IDEA, that plaintiff must first exhaust state administrative remedies under that statute. See 20 U.S.C. § 1415(f) (requiring state to establish process for impartial due process hearing); *id.* § 1415(g) (providing for appeal to state educational agency if due process hearing is held by the local educational agency).

Preserving non-IDEA claims serves an important role, because the IDEA itself provides only limited substantive protection and authorizes only limited relief. Substantively, the IDEA's requirement of a "free appropriate public education [FAPE]," 20 U.S.C. § 1412(a)(1), implemented through an IEP, 20 U.S.C. § 1414(d), guarantees only a "basic floor of opportunity" for children with disabilities. *Board of Education v.*

Rowley, 458 U.S. 176, 201 (1982). It does not guarantee "'equal' educational opportunities." *Id.* at 198. Had E.F. challenged the denial of her service dog under the IDEA, then, she would have had to show not that the service dog was necessary to provide her equal access to the school facilities, but instead that the service dog was necessary for her to achieve the basic floor of *educational* opportunity that the IDEA guarantees. And although the IDEA authorizes an order of "reimbursement of the costs of private special-education services in appropriate circumstances," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009), it does not authorize the recovery of money damages. See *Burlington School Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that tuition reimbursement is available specifically because that remedy is restitutionary and does *not* constitute damages).

The ADA, by contrast, is an antidiscrimination statute that substantively requires equal opportunity. In particular, Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability" 42 U.S.C. § 12132. The statute specifically contemplates that, to avoid discrimination, such a public entity will be required to make "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Congress authorized the Department of Justice to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134. Because of the importance of service animals to ensuring equal access for many people with disabilities, the Department has interpreted the statute's "reasonable modifications" language to

require that, with certain exceptions not applicable here, "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g) (2011).[2] This rule applies to all state and local government entities, and it does not require a showing of a particular *educational* need before an individual may invoke its protections. Unlike the IDEA, the ADA also provides for damages liability. See *Lane*, 541 U.S. at 517.[3]

C. Prior Proceedings

In 2010, following the School District's refusal to permit Wonder to accompany E.F to school, her parents began homeschooling her. App. 4. They also filed a complaint with the Office of Civil Rights of the United States Department of Education (OCR); their complaint alleged that the School District had violated the ADA and the Rehabilitation Act by refusing to permit E.F to use her service dog at school. *Id.* In

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[2] The service animal regulation reflects the Department's longstanding interpretation of Title II's reasonable-modifications requirement. See Statement of Interest of United States at 4-5 & n.5, *Alboniga v. School Bd. of Broward County*, No. 0:14-CV-60085-BB (S.D. Fla., filed Jan. 26, 2015), available at http://www.ada.gov/briefs/broward_county_school_board_soi.pdf.

[3] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, applies essentially the same substantive standards as ADA Title II, and it authorizes identical remedies. See 29 U.S.C. § 794a; 42 U.S.C § 12133. But instead of applying to all public entities, it applies only to entities that "receiv[e] Federal financial assistance." 29 U.S.C. § 794(a).

2012, after an investigation, OCR issued a 14-page decision, which concluded that the School District had violated the ADA and the Rehabilitation Act. Cplt. Exh. A. at 11. The agency noted the School District's argument that E.F "was receiving a FAPE" even without being allowed to use her dog. *Id.* But OCR determined that a "FAPE analysis" was inappropriate, because it "fail[ed] to take into account one of the fundamental purposes of Title II: to increase the independence of individuals with disabilities." *Id.* The agency also concluded that the School District's argument ignored the Rehabilitation Act's "provisions relating to equal opportunity." *Id.*

In response to OCR's findings, the School District "agreed to permit [E.F.] to attend school with Wonder starting in fall 2012." App. 4. But it continued to deny liability. Cplt. Exh. A. at 11. E.F.'s parents "had serious concerns that the administration would resent [E.F.] and make her return to school difficult." Cplt ¶ 8. Accordingly, they decided to enroll her "in a school in a different district where they encountered no opposition to Wonder's attending school with" her App. 4.

In December 2012, E.F., by and though her parents as next friends, filed this suit "seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012." *Id.* The lawsuit claimed that the School District's actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, and it sought damages for the social and emotional harm those actions caused E.F Cplt. ¶ 51.

The district court dismissed the suit for failure to exhaust state administrative remedies under the

IDEA. App. 37. A divided panel of the Sixth Circuit affirmed. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." App. 17 But despite the HCPA's text, which limits exhaustion to cases "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the majority held that "this does not in itself excuse the exhaustion requirement," because otherwise plaintiffs could "evade" that requirement "simply by 'appending a claim for damages.'" App. 17 (quoting *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000)). The panel held that exhaustion is required "when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." App. 6. Because it concluded that the "core harms" alleged by E.F. "relate to the specific educational purpose of the IDEA," and that she "could have used IDEA procedures to remedy these harms," the panel concluded that the complaint was properly dismissed for failure to exhaust. App. 6.

Judge Daughtrey dissented. She specifically noted a conflict between the majority's decision and the Ninth Circuit's decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-875 (9th Cir. 2011) (*en banc*), cert. denied, 132 S. Ct. 1540 (2012), which "held [that] '[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (quoting *Payne*, 653 F.3d at 871 (emphasis in Judge Daughtrey's dissent)).

The court denied *en banc* review, though Judge Daughtrey stated that she would have granted rehearing. App. 53-54.

REASONS FOR GRANTING THE PETITION

The HCPA explicitly provides that the IDEA is not the exclusive remedy available to children with disabilities who allege a violation of their rights. 20 U.S.C. § 1415(*l*). The plain text further provides that children who file suit under other statutes must first exhaust state administrative proceedings under the IDEA only when those children "*seek*[] *relief* that is also available under" the IDEA. *Id.* (emphasis added). The courts of appeals have persistently disagreed about the proper interpretation of this statutory language. Although damages are not available under the IDEA, the Sixth Circuit held that a disabled child who brings a damages claim under the ADA and the Rehabilitation Act must first exhaust IDEA proceedings "when the *injuries* alleged can be remedied through IDEA procedures, or when the *injuries* relate to the specific substantive protections of the IDEA." App. 6 (emphasis added). At least six other circuits have adopted substantially the same rule.

But the Ninth Circuit, in an *en banc* opinion by Judge Bybee, has specifically rejected that "'injury-centered' approach" as conflicting with the HCPA's plain language. *Payne*, 653 F.3d at 874-875.[4] Rather,

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[4] In *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.), cert. denied, 135 S. Ct. 403 (2014), the Ninth Circuit overruled *Payne* (and earlier Ninth Circuit cases) to the extent that they allowed courts (in and out of the IDEA context) to consider exhaustion through the vehicle of "unenumerated Rule 12(b) motions" rather than

the Ninth Circuit has held that a "relief-centered approach" better accords with the text: "[W]hether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.* at 875. Had Petitioners brought this suit in the Ninth Circuit, their case would not have been dismissed on exhaustion grounds, because the damages relief they actually sought is not available under the IDEA.

This Court denied a petition for *certiorari* in *Payne*, even though the Ninth Circuit acknowledged that its decision conflicted with the rulings of several other courts of appeals. See *id.* at 873-874 & n.3. In opposing the petition in *Payne*, the successful plaintiff argued that this Court should "allow *Payne*'s 'relief-centered' approach to play-out in the federal circuits," before taking on the issue. Br. in Opp., *Peninsula School Dist. v. Payne*, 2011 WL 6859439 at *9. Since that time, the Second and Sixth Circuits have refused to budge from their prior "injury-centered" approach even after specifically considering the analysis in *Payne*. The Third and Tenth Circuits, too, have applied the "injury-centered" approach post-*Payne*, though without explicitly addressing that case. It should now be clear that the conflict created by *Payne* will not be resolved without review by this Court.

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motions for summary judgment. But the Ninth Circuit has reaffirmed *Payne*'s HCPA holding "that the IDEA's exhaustion provision applies only in cases where the relief sought is available under the IDEA." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014). That, of course, is the holding relevant here.

The fact pattern presented by this case is a recurring one. As here, school districts have repeatedly denied children with disabilities their rights, guaranteed by the ADA and the Rehabilitation Act, to bring service dogs to school. And they have done so on the ground that the service animals were unnecessary to satisfy the districts' educational obligations under the IDEA.[5] These children with disabilities, and their

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[5] See *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 244 (2d Cir. 2008) (district refused to allow child with hearing impairment to bring his service dog, based on its determination that he "enjoyed full access to the district's special education programs and facilities and that he currently did not need a service dog at school, because he was functioning satisfactorily under the approved IEP"); *Alboniga v. Sch. Bd. of Broward County Fla.*, No. 14-CIV-60085, 2015 WL 541751, at *8 (S.D. Fla. Feb. 10, 2015) (district refused to allow child with multiple disabilities to bring his service dog, based on its view that "the service animal is not necessary for or relevant to A.M.'s educational experience—that the services provided by the animal are performed through other means by school staff in order to provide A.M. a FAPE in accordance with his IEP"); Settlement Agreement Between United States & Delran Township Sch. Dist., June 2014, available at http://www.ada.gov/delran-sa.htm (Department of Justice found that district refused to allow child with autism to bring his service dog to school, based at least in part on the district's uncertainty whether the child would be "able to benefit from instruction without the service animal"); Statement of Interest of United States at 5, *C.C. v. Cypress Sch. Dist.*, No. CV 11-00352 AG (RNBx) (C.D. Cal., filed June 10, 2011), available at http://www.ada.gov/briefs/cc_interest.pdf (district refused to allow child with autism to bring his service dog to school because of doubts that the dog was necessary to enable him to achieve the educational goals of his IEP, without "consider[ing] how a service dog might benefit C.C. in other settings, supported by use at school, and whether C.C. might have a civil right to use a service dog").

parents, have been forced to file complaints in court and with the United States Department of Justice to enforce their ADA and Rehabilitation Act rights. The position of the Sixth Circuit would require them first to exhaust state administrative proceedings under the IDEA—a statute that does not form the basis for their claims and does not offer them a damages remedy—before going to court to enforce their rights. Imposing this burdensome step flies in the face of the plain statutory text. The Court should grant the petition for *certiorari*.

A. There is a Persistent Conflict in the Circuits

The Sixth Circuit held that, before filing a damages lawsuit under the ADA and the Rehabilitation Act, a child with a disability must first exhaust state administrative proceedings under the IDEA if those proceedings could possibly have provided a remedy—though not a *damages* remedy—for the injuries the child alleges. App. 6. That holding accords with the rulings of at least six other courts of appeals. But it squarely conflicts with the Ninth Circuit's *en banc* holding in *Payne*, *supra*.

The Sixth Circuit's holding is but the latest in a line of cases that derives from the Seventh Circuit's decision in *Charlie F v. Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996).[6] In *Charlie F.*, a fourth grader sued his school under the ADA, the Rehabilitation Act, and the Constitution for disability-

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[6] The Sixth Circuit relied (App. 17) on its earlier decision in *Covington*, 205 F.3d at 916-917, which itself specifically relied on *Charlie F*

based harassment that his teacher allegedly orchestrated; he sought damages for emotional distress. See *id.* at 990-991. Although it recognized that compensatory damages are not available under the IDEA, see *id.* at 991, the Seventh Circuit nonetheless held that the district court properly dismissed the suit for failure to exhaust IDEA administrative remedies, see *id.* at 991-993. The court reasoned that IDEA proceedings might conceivably result in non-damages relief that could address the harms of which the plaintiff complained, and that the plaintiff therefore first had an obligation to pursue those proceedings before seeking damages under other legal regimes. "Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm," the court explained. *Id.* at 993. "But," it concluded, "parents cannot know that without asking, any more than we can." *Id.* Because "at least in principle relief [was] available under the IDEA," *id.*, even if the lawsuit did not "seek[]" that relief (cf. 20 U.S.C. § 1415(*l*)), the Seventh Circuit held that exhaustion was required: "the theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply." *Id.* at 992.

In addition to the Sixth Circuit here, the First, Second, Third, Tenth, and Eleventh Circuits have specifically relied on *Charlie F.* to hold that a plaintiff who seeks compensatory damages must still exhaust IDEA remedies if administrative proceedings under that statute could theoretically provide any relief for his or her injuries. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 61-63 (1st Cir. 2002); *Cave*, 514

F.3d at 246-247 (Second Circuit); *Batchelor v. Rose Tree Media School District*, 759 F.3d 266, 276-278 (3d Cir. 2014); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063-1068 (10th Cir. 2002); *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1422 & n.10 (11th Cir.), cert. denied, 525 U.S. 816 (1998). Several of these decisions highlight the breadth of the pro-exhaustion doctrine applied by the circuits that follow *Charlie F*

In *Cave*, the Second Circuit required exhaustion in a case brought under the ADA, the Rehabilitation Act, and Section 1983 to challenge a district's refusal to permit a child with a disability to attend school with his service dog. The court reached that result even though the plaintiffs sought "pecuniary damages, a remedy unavailable under the IDEA." *Id.*, 514 F.3d at 247. In so holding, the court specifically relied on *Charlie F.*'s "theory behind the grievance" language. *Id.* at 246. The Second Circuit has specifically refused to reconsider that ruling in light of the Ninth Circuit's decision in *Payne*. See *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 496 F App'x 131, 134 (2d Cir. 2012) (summary order). See also *Stropkay v. Garden City Union Free Sch. Dist.*, 593 Fed. Appx. 37 (2d Cir. 2014) (summary order) (reaffirming these cases).

The Third Circuit applied the same principle in *Batchelor*, *supra*. A child with a disability and his mother alleged that the school district had retaliated against them in violation of, *inter alia*, the ADA and the Rehabilitation Act; they filed a federal-court complaint seeking compensatory damages. See *Batchelor*, 759 F.3d at 270-271. Although it

acknowledged that compensatory damages are not available under the IDEA, see *id.* at 277 n.13, the Third Circuit held that the plaintiffs' case was properly dismissed for failure to exhaust remedies under that statute, see *id.* at 278. Like the Second Circuit, the court relied on *Charlie F*'s "theory behind the grievance" language. *Id.* at 276.

In *Cudjoe*, 297 F.3d at 1068, the Tenth Circuit held that a student with a disability was required to exhaust IDEA administrative remedies before bringing suit against his school district under the Rehabilitation Act—even though the student sought damages and had never even been identified as eligible for services under the IDEA. The court relied on *Charlie F* to hold that "the IDEA's exhaustion requirement will not be excused simply because a plaintiff requests damages, which are ordinarily unavailable in administrative hearings held pursuant to the statute." *Id.* at 1066. Rather, the court held, exhaustion is required if "the plaintiff has alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Id.* (internal quotation marks omitted). The Tenth Circuit recently reaffirmed that principle. See *A.F. ex rel. Christine B. v. Espanola Public Schools*, ___ F.3d ___, 2015 WL 5333491 at *2 (10th Cir., Sept. 15, 2015).

In its *en banc* decision in *Payne*, by contrast, the Ninth Circuit explicitly rejected the position of circuits like these that apply an "injury-centered" approach to exhaustion under the HCPA. *Payne*, 653 F.3d at 874. In a comprehensive opinion by Judge Bybee, the Ninth Circuit explained that a focus on whether the plaintiff "alleg[ed] misconduct that *in theory* could have been

redressed by resorting to administrative remedies under the IDEA" improperly "treat[s] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students." *Id.* at 875. The statutory text, the court concluded, establishes that "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.*

Applying the plain text of the HCPA, the Ninth Circuit held that the statute "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent," *id.*[7]; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student" (really just a subset of the first category), see *Payne*, 653 F.3d at 875; and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action," *id.*[8]

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[7] *Payne*'s example of a "functional equivalent" involved a plaintiff "seek[ing] damages for the cost of a private school education." *Payne*, 653 F.3d at 875. Although the IDEA does not provide for damages, it does require school districts to reimburse the cost of a private school education in some circumstances. See p. 5, *supra*.

[8] As an example of this sort of case, *Payne* listed a Rehabilitation Act claim "premised on a denial of a FAPE." *Id.* The Department of Education's Rehabilitation Act regulations require schools to provide all qualified children with disabilities "a free appropriate public education." 34 C.F.R. § 104.33(a). The Ninth Circuit was evidently referring to cases brought under this regulation, in which

In so holding, the court largely adopted the position urged by the United States Departments of Education and Justice in a jointly-signed *amicus* brief. See *id.*

Had E.F. brought this case in the Ninth Circuit, the court would not have dismissed it for failure to exhaust. E.F did not seek an IDEA remedy or its functional equivalent, seek prospective relief to alter her IEP or educational placement, or raise any claim that relied on the denial of a FAPE. To the contrary, *none* of the relief she specifically requested was available under the IDEA. See pp. 19-20, *infra*. She sought damages for emotional distress—a form of relief that is not available in IDEA proceedings. And her claim relies entirely on the ADA and Rehabilitation Act's guarantee that people with disabilities can generally use service animals in public buildings (whether those buildings are schools, courthouses, or hockey rinks). It is in no way premised on the denial of a free appropriate public education. Because the remedies E.F. actually sought—as opposed to those she might conceivably have sought in a hypothetical alternate universe—were not available under the IDEA, the Ninth Circuit would not have dismissed her case. The conflict in the circuits thus determined the outcome.

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the plaintiff seeks to prove the substance of an IDEA violation in order to establish a violation of the Rehabilitation Act. But the ADA and Rehabilitation Act also impose an array of requirements, like the requirement of reasonable modification of policies and its specific application to permit people with disabilities to use service dogs, that are not premised on the denial of a FAPE. See pp. 5-6, *supra*.

That conflict is not likely to resolve itself without this Court's intervention. The Sixth Circuit made its ruling with *Payne* in full view. The dissenting judge specifically called attention to the Ninth Circuit's holding that "'[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (Daughtrey, J., dissenting) (quoting *Payne*, 653 F.3d at 871) (emphasis in opinion below). But the majority persisted in following prior Sixth Circuit precedent that held that exhaustion is required even when plaintiffs "seek money damages, a remedy unavailable under the IDEA." *Id.* at 17 (citing cases). The Second Circuit, too, has specifically refused to reconsider its prior precedent in light of *Payne*. See *Baldessarre*, 496 F App'x at 134. And although the Third Circuit did not specifically address *Payne*, it has nonetheless continued, as recently as 2014, to apply the "injury-centered" approach the Ninth Circuit explicitly rejected. See *Batchelor*, 759 F.3d at 276-278. The Tenth Circuit did the same in September 2015. See *A.F.*, 2015 WL 5333491 at *2. This Court should grant *certiorari* to resolve the conflict.

B. The Sixth Circuit's Decision is Wrong

Petitioners' complaint sought one principal form of relief: "damages in an amount to be determined at trial." Cplt. 16 (prayer for relief). It also sought two ancillary forms of relief on Petitioners' federal claims: (1) "a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, [and] Title II of the Americans with Disabilities Act"; and (2) "attorneys' fees pursuant to

the Rehabilitation Act, the Americans with Disabilities Act, [and] 42 U.S.C. § 1988." *Id.*[9]

None of these forms of relief was available under the IDEA. The IDEA does not provide for damages. See p. 5, *supra*. Nor does the IDEA specifically provide for declaratory relief—and the IDEA provisions empowering state administrative adjudicators certainly grant them no authority to issue a declaration that a school district violated some *other* statute like the ADA or the Rehabilitation Act. See 20 U.S.C. § 1415(f)(3)(E) (hearing officer may decide whether child received a free appropriate public education and was accorded certain related procedural protections under the IDEA), § 1415(k)(3) (hearing officer may decide whether child's misconduct was a manifestation of a disability and

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[9] The complaint also contained a boilerplate request for "any other relief this Court deems appropriate." *Id.* In its response to the *en banc* petition below, Respondent argued that, because Petitioners sought "*any* other relief," and IDEA administrative proceedings could grant *some* other relief, Petitioners' complaint necessarily sought relief that is also available under the IDEA. Resp. to Pet. for Rhg. 6. That argument is too clever by half. At the time Petitioners filed their complaint E.F.'s parents had moved her to a different school district and had no intention of returning her to Respondent's schools. See p. 7, *supra*. Thus, they could seek only retrospective damages that were not available under the IDEA—and the complaint *never* specifically asked for forward-looking relief of a type that was available under the IDEA in any event. Even if it had, when a plaintiff brings a case that contains some claims that should have been exhausted and others that need not have, the proper procedure is to dismiss only the claims for which exhaustion was required. See *Jones v. Bock*, 549 U.S. 199, 221-222 (2007). But the lower courts dismissed this case *in its entirety*—including the claims for damages that are concededly not available under the IDEA.

whether maintaining the child's current placement is substantially likely to lead to injury). And although the IDEA provides for attorneys' fees, it provides only for fees "[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. § 1415(*i*)(3)(B)(i). Here, the complaint seeks attorneys' fees, not for IDEA proceedings, but for the effort to enforce E.F 's distinct rights under the ADA and the Rehabilitation Act.

Because the complaint sought relief that was *not* available under the IDEA, and the HCPA specifically limits its exhaustion requirement to cases "seeking relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the lower courts erred in dismissing the case for failure to exhaust. This Court has long held that any requirement of administrative exhaustion depends on congressional intent in constructing the particular statutory scheme. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of paramount importance to any exhaustion inquiry is congressional intent.") (internal quotation marks omitted); *McKart v. United States*, 395 U.S. 185, 193 (1969) ("Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."). Cf. *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000) (stating that "requirements of administrative issue exhaustion are largely creatures of statute").

In particular, the Court has repeatedly stated that "'a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.'" *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 580 (1989) (quoting *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501-502 (1982)). And the legislative intent is best

determined by the statutory text. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted). Here, the text could not be more clear: Administrative exhaustion is required only where the plaintiff "seek[s] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). By requiring exhaustion of E.F.'s claims, though the relief she sought was not available under the IDEA, the Sixth Circuit disregarded that plain text.

Rather than follow the text of the statute, the Sixth Circuit applied a test under which a court must ask whether the "core harms" alleged by the plaintiff "relate to the specific educational purpose of the IDEA," and whether the plaintiff "could have used IDEA procedures to remedy these harms"—even if those procedures could not have provided the relief actually requested in the lawsuit. App. 6. But, as the United States has explained, a test that focuses "not [on] what relief the plaintiff actually seeks, but rather [on] what relief the plaintiff *could have* sought based on the injuries alleged" is one that "amounts to a rewriting of the statutory text." Brief for the United States as *Amicus Curiae* at 14, *Payne v. Peninsula Sch. Dist.*, No. 07-35115 (9th Cir., filed Nov. 9, 2010), available at http://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/paynebr.pdf.[10] The HCPA requires exhaustion

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[10] The *Payne* brief was signed both by the General Counsel of the Department of Education and the Assistant Attorney General for Civil Rights. Because the Department of Education administers and enforces the IDEA, and the Department of Justice enforces the

for an action "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*)—not for an action that *might, hypothetically, have sought* such relief.

In justifying its ruling, the Sixth Circuit did not look to text but to policy considerations. In particular, the court sought to prevent children with disabilities and their families from "evad[ing]" the exhaustion requirement simply by seeking damages. App. 17. The Sixth Circuit's holding derives from the Seventh Circuit's *Charlie F.* decision, which also aimed to prevent parents from "opt[ing] out of the IDEA." *Charlie F.*, 98 F.3d at 992. But it is not the job of a court "to rewrite the statute" simply to avoid what seems like an objectionable policy result. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015).

In any event, the objective of avoiding evasion of the IDEA's exhaustion requirement and channeling educational-rights claims into the IDEA administrative processes does not reflect "a fair understanding of the legislative plan" of the HCPA. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). To the contrary, those goals better fit with *Smith v. Robinson*, *supra*—the case that Congress specifically *overturned* in the HCPA. See *Smith*, 468 U.S. at 1012-1013 (stating that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme" and therefore concluding that "the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim" to educational rights). Congress sought in the

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ADA and the Rehabilitation Act, the views in that brief are entitled to particular respect.

HCPA to preserve the right to go to court to pursue non-IDEA educational-rights claims—and to eschew *Smith*'s channeling of those claims into IDEA administrative fora. See pp. 3-4, *supra*. In place of *Smith*, the HCPA adopted a simple regime, in which plaintiffs filing educational-rights actions need not exhaust unless they "seek[] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). To require exhaustion for cases that do *not* seek relief available under the IDEA directly conflicts with the HCPA's text and purpose.

In both its text and its purpose, the HCPA is decisively unlike the exhaustion provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA). In *Booth v. Churner*, 532 U.S. 731 (2001), this Court read the PLRA to require prisoners seeking money damages in federal court first to exhaust prison administrative proceedings—even if damages were not available in those proceedings. The *Booth* Court relied on the PLRA's text, which provides that "[n]o action shall be brought with respect to prison conditions * * * until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Court noted that this text simply refers generally to "such administrative remedies as are available," rather than requiring the availability of any particular form of relief as a prerequisite for exhaustion. See *Booth*, 532 U.S. at 738-739. Moreover, the PLRA's exhaustion provision seemed specifically crafted as a response to this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). *McCarthy* had read an earlier version of Section 1997e(a) as not requiring exhaustion where a prisoner sought only money damages and the prison's administrative remedies could not provide such

damages. See *id.* at 150. In broadening Section 1997e(a)'s exhaustion requirement in the PLRA, the Court concluded, "the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result." *Booth*, 532 U.S. at 740.

Unlike the PLRA, the HCPA *does* specifically refer to the particular relief the plaintiff seeks. It requires, as a prerequisite for exhaustion, that such relief have been "available under" the IDEA. 20 U.S.C. § 1415(*l*). And unlike the PLRA, the HCPA was not designed to *broaden* the exhaustion requirement or otherwise to reduce federal litigation. Cf. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (PLRA aimed "to reduce the quantity and improve the quality of prisoner suits"). Rather, the HCPA was designed to expand access to federal courts for children with disabilities asserting violations of their rights—and to overturn this Court's *Smith* decision that channeled all such cases into the IDEA process. The Sixth Circuit's holding thus conflicts with both the text and the purpose of the HCPA. This Court should grant certiorari to reaffirm the primacy of the framework Congress constructed, and to resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P 32.1(b)

File Name: 15a0121p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed June 12, 2015]

STACY FRY and BRENT FRY, as next friends of minor E.F., *Plaintiffs-Appellants*,	)
v.	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:12-cv-15507—Lawrence P. Zatkoff,
District Judge.

Argued: October 1, 2014

Decided and Filed: June 12, 2015

Before: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

COUNSEL

ARGUED: James F Hermon, DYKEMA GOSSETT PLLC, Detroit, Michigan, for Appellants. Timothy J. Mullins, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees. **ON BRIEF:** James F Hermon, DYKEMA GOSSETT PLLC, Detroit, Michigan, for Appellants. Timothy J. Mullins, Kenneth B. Chapie, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees.

ROGERS, J., delivered the opinion of the court in which DONALD, J., joined. DAUGHTREY, J. (pp. 14–23), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. The administrative exhaustion requirements of the Individuals with Disabilities Education Act (IDEA) must, under that act, be met even with respect to some claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The question on this appeal is whether the ADA and Rehabilitation Act claims in this case are such claims requiring IDEA exhaustion.

The Frys' daughter, E.F., suffers from cerebral palsy and was prescribed a service dog to assist her with everyday tasks. Her school, which provided her with a human aide as part of her Individualized Education Program (IEP) under the IDEA, refused to permit her to bring her service dog to school. The Frys sued the

school, its principal, and the school district, alleging violations of the ADA and the Rehabilitation Act and state disability law. The district court granted the defendants' motion to dismiss under Fed. R. Civ. P 12(c) on the grounds that because the Frys' claims necessarily implicated E.F.'s IEP, the IDEA's exhaustion provision required the Frys to exhaust IDEA administrative procedures prior to bringing suit under the ADA and Rehabilitation Act. The Frys appeal, arguing that the IDEA exhaustion provision does not apply because they do not seek relief provided by IDEA procedures. But because the specific injuries the Frys allege are essentially educational, they are exactly the sort of injuries the IDEA aims to prevent, and therefore the IDEA's exhaustion requirement applies to the Frys' claims.

Because this is an appeal from a grant of a motion to dismiss based on the pleadings, we take as true the facts alleged in the Frys' complaint. *See S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973).

E.F., the daughter of Stacy and Brent Fry, was born with spastic quadriplegic cerebral palsy, which significantly impairs her motor skills and mobility. In 2008, E.F. was prescribed a service dog. Over the course of the next year, E.F. obtained and trained with a specially trained service dog, a hybrid goldendoodle named Wonder. Wonder assists E.F. by increasing her mobility and assisting with physical tasks such as using the toilet and retrieving dropped items. At the time this dispute arose, E.F. could not handle Wonder on her own, but at some point in the future she would be able to. In October 2009, when Wonder's training

was complete, her school, Ezra Eby Elementary School, refused permission for Wonder to accompany E.F at school. There was already an IEP in place for E.F for the 2009–2010 school year that included a human aide providing one-on-one support. In a specially convened IEP meeting in January 2010, school administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide. In April 2010, the school agreed to a trial period, to last until the end of the school year, during which E.F. could bring Wonder to school. During this trial period, however, Wonder was not at all times permitted to be with E.F or to perform some functions for which he had been trained. At the end of the trial period, the school informed the Frys that Wonder would not be permitted to attend school with E.F. in the coming school year.

The Frys then began homeschooling E.F. and filed a complaint with the Office of Civil Rights at the Department of Education under the ADA and § 504 of the Rehabilitation Act. Two years later, in May 2012, the Office of Civil Rights found that the school's refusal to permit Wonder to attend with E.F. was a violation of the ADA. At that time, without accepting the factual or legal conclusions of the Office of Civil Rights, the school agreed to permit E.F to attend school with Wonder starting in fall 2012. However, the Frys decided to enroll E.F in a school in a different district where they encountered no opposition to Wonder's attending school with E.F

The Frys filed suit on December 17, 2012, seeking damages for the school's refusal to accommodate

Wonder between fall 2009 and spring 2012. The Frys alleged the following particular injuries: denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with E.F.'s ability to form a bond with Wonder, denial of the opportunity to interact with other students at Ezra Eby Elementary School, and psychological harm caused by the defendants' refusal to accommodate E.F. as a disabled person. The Frys sought relief under Title II of the ADA, § 504 of the Rehabilitation Act (which prohibits discrimination based on disability in "any program or activity receiving Federal financial assistance"), and the Michigan Persons with Disabilities Civil Rights Act. The district court declined to exercise supplemental jurisdiction over the state law claim.

On January 10, 2014, the district court granted the defendants' motion to dismiss pursuant to Rule 12(c), finding that the IDEA's exhaustion requirements applied to the Frys' claims and dismissing them without prejudice. The court noted that although the Frys did not specifically allege any flaw in E.F.'s IEP, if she were permitted to attend school with Wonder, that document would almost certainly have to be modified in order to articulate the policies and practices that would apply to the dog. *EF ex rel. Fry v. Napoleon Community Schools*, No. 12-15507, 2014 WL 106624, at *5 (E.D. Mich. Jan. 10, 2014). Therefore, the Frys' request for permission for E.F. to attend school with Wonder "would be best dealt with through the administrative process," and exhaustion was required. *Id.* Because the Frys had not exhausted IDEA administrative remedies, the district court dismissed their suit without prejudice. *Id.* The Frys timely appealed.

The IDEA exhaustion requirement applies to the Frys' claims. Under that statute, plaintiffs must exhaust IDEA procedures if they seek "relief that is also available" under IDEA, even if they do not include IDEA claims in their complaint. 20 U.S.C. § 1415(*l*). This language requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA. *See S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir 2008). The core harms that the Frys allege arise from the school's refusal to permit E.F to attend school with Wonder relate to the specific educational purpose of the IDEA. The Frys could have used IDEA procedures to remedy these harms. Therefore, the nature of the Frys' claims required them to exhaust IDEA procedures before filing suit under the ADA and the Rehabilitation Act.

The IDEA's exhaustion requirement ensures that complex factual disputes over the education of disabled children are resolved, or at least analyzed, through specialized local administrative procedures. The IDEA outlines standards and procedures for accommodations and services provided to disabled children whose disabilities cause them to need "special education and related services." 20 U.S.C. § 1401(3)(A). One of its primary purposes is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A). To this end, the IDEA requires that schools and school districts develop an IEP for each such child. *Id.* § 1414(d)(2)(A). The IEP outlines "the child's present levels of academic

achievement and functional performance[,] measurable annual . . academic and functional goals," measurement criteria for meeting those goals, and the "special education and related services and supplementary aids and services . and . the program modifications or supports for school personnel that will be provided for the child" to make progress in achieving the goals. *Id.* § 1414(d)(1)(A)(i).

The IDEA's procedures for creating and amending a child's IEP encourage participation by those directly involved in the child's care in education, application of expert analysis, and swift dispute resolution. There must be an IEP in effect for each disabled child by the start of each school year. *Id.* § 1414(d)(2)(A). The IEP is created by an IEP team, which includes the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, and a representative of the "local education agency" who is qualified in special education, knowledgeable about the general curriculum, and knowledgeable about the local education agency's resources. *Id.* § 1414(d)(1)(B). Any party can present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," including disputes over the content of the child's IEP. *Id.* § 1415(b)(6)(A); *see id.* § 1401(9)(D) (defining a free appropriate public education as an education "provided in conformity with the individualized education program"). Within 15 days of receiving notice of a child's parents' complaint, the local educational agency must hold a "preliminary meeting" with the parents and other members of the IEP team to give the local educational agency "the

opportunity to resolve the complaint." *Id.* § 1415(f)(1)(B)(i). If the local educational agency has not resolved the dispute within 30 days of receiving the complaint, the timeline for a "due process hearing" begins. *Id.* § 1415(f)(1)(B)(ii). This process must conclude—with the local or state educational agency issuing a written decision to the parties—within 45 days. 34 C.F.R. § 300.515(a). If the local agency conducted the hearing, the decision can be appealed to the state educational agency, which conducts an impartial review and issues a decision within 30 days. 20 U.S.C. § 1415(g); 34 C.F.R. § 300.515(b). These deadlines are of course not entirely set in stone, but in the abstract a dispute about an IEP should go through a resolution meeting, a local agency determination, and a state agency determination within 105 days of the initial complaint. Only at this point may either party take the dispute to court, and the court then receives "the records of the administrative proceedings." 20 U.S.C. § 1415(i)(2). The statute and implementing regulations ensure that the parties have a chance to resolve the dispute without going to court and that local and state educational agencies have a chance to analyze and study it.

Requiring exhaustion of administrative procedures prior to filing suit under the IDEA has clear policy justifications: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the Act. Federal courts—generalists with no expertise in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose." *Crocker v. Tenn.*

Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989) (analyzing substantially similar provisions of the IDEA's predecessor statute). The IDEA calls for highly fact-intensive analysis of a child's disability and her school's ability to accommodate her The procedures outlined above ensure that the child's parents and educators, as well as local experts, are first in line to conduct this analysis.

The IDEA's substantive protections overlap significantly with other federal legislation and constitutional protections, and so this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action. The IDEA contemplates and explicitly precludes this possibility:

> [B]efore the filing of a civil action under [the ADA, the Rehabilitation Act, or other Federal laws protecting the rights of children with disabilities] *seeking relief that is also available under this subchapter*, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). The exhaustion requirement was intended "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc). Accordingly, it makes sense to require IDEA exhaustion in order to preserve

the primacy the IDEA gives to the expertise of state and local agencies.

We have held that exhaustion is not required when the injuries alleged by the plaintiffs do not "relate to the provision of a FAPE [free appropriate public education]" as defined by the IDEA, and when they cannot "be remedied through the administrative process" created by that statute. *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014); *see S.E.*, 544 F.3d at 642. When they do relate to the provision of the child's education and can be remedied through IDEA procedures, waiving the exhaustion requirement would prevent state and local educational agencies from addressing problems they specialize in addressing and require courts to evaluate claims about educational harms that may be difficult for them to analyze without the benefit of an administrative record. Under *S.E.* and *F.H.*, exhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP Similarly, the Seventh Circuit required exhaustion when "[b]oth the genesis and the manifestations of the problem [were] educational." *Charlie F v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996). In such a situation, the participants in IDEA procedures will answer the same questions a court would ask, and they have a chance of solving the child's and the child's parents' problem before the parents and their child become plaintiffs.

The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that

would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education. In particular, they allege explicitly that the school hindered E.F from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents.

In the context of the accommodations the school already provided to E.F., the additional value of allowing Wonder to attend with E.F. was educational—the sort of interest the IDEA protects. E.F 's IEP already included a human aide who, it appears, assisted E.F with the tasks Wonder could perform. Thus the Frys' claim is not that the school failed to accommodate E.F 's disability at all, but that the accommodation provided was not sufficient. Whether this claim amounts to alleging a denial of a free appropriate public education, or whether it could be resolved through IDEA procedures, depends on why the existing accommodation was not sufficient relative to what Wonder could provide.

If the human aide was not a sufficient accommodation, it was because he or she did not help E.F learn to function independently as effectively as Wonder would have and perhaps because he or she was

not as conducive to E.F 's participating confidently in school activities as Wonder would have been. The complaint does not allege that the human aide was less effective than Wonder would have been in providing immediate physical assistance; thus the Frys do not appear to suggest that E.F was directly denied physical access to public school facilities. Instead, having Wonder at school was important for E.F to "form a bond" with the dog, a bond that would make Wonder a more effective service animal "outside of school." The Frys characterize Wonder's independent value to E.F as assistance with specific physical tasks, enabling her "to develop independence and confidence," and helping her "to bridge social barriers." Thus if the human aide was not a sufficient accommodation relative to Wonder, that was because he or she did not increase E.F 's ability to perform physical tasks and function confidently and independently outside of school. One might also infer, though the Frys do not allege it directly, that relying on only a human aide without the additional presence of a service dog would inhibit E.F 's sense of confidence and independence, as well as her ability to overcome social barriers, *in* school.

The other harms that the Frys specifically identify—denial of access to school facilities, denial of the use of Wonder as a service dog at school, harms caused by having to leave the school, and emotional distress caused by the school's refusal to accommodate her—all depend on the assumption that the school's refusal to permit Wonder's attendance harmed E.F in the ways identified above. For example, E.F was denied access to school facilities in the sense that school facilities did not provide her with an

accommodation (i.e., permission to use Wonder) she reasonably needed, but she needed Wonder in school only (it appears on the face of the complaint) to form a stronger bond with the dog and, perhaps, to feel more confident and independent. In sum, each of these secondary injuries exists only to the extent that Wonder's absence is harmful, or else (in the case of injuries resulting from switching schools, for instance) would be entirely avoidable if Wonder's absence were not harmful.

The primary harms of not permitting Wonder to attend school with E.F —inhibiting the development of E.F 's bond with the dog and, perhaps, hurting her confidence and social experience at school—fall under the scope of factors considered under IDEA procedures. Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be. The goal falls squarely under the IDEA's purpose of "ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Thus developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" used to set goals in E.F 's IEP *Id.* § 1414(d)(1)(A)(i)(II). "Educational needs" is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s "academic, developmental, and functional needs," which means that the IEP should include what a

student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). "A request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is hence not entirely beyond the bounds of the IDEA's educational scheme." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008). The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F.

To the extent that the Frys also allege that Wonder would have provided specific psychological and social assistance to E.F. *at* school, the value of this assistance is also crucially linked to E.F's education. Accommodations that help make a student feel more comfortable and confident at school should be included in an IEP, which lists "the program modifications or supports for school personnel that will be provided for the child . . . to be educated and participate with other children with disabilities and nondisabled children in [educational activities]." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Thus an IEP should take into account any potential accommodations that will make a disabled child feel more comfortable in the school environment, since such accommodations will help the child participate actively in school activities. The IDEA is designed to address precisely the sorts of harms the Frys allege in their complaint; assuming their claims are correct, they should have been able to obtain relief under IDEA procedures, if followed properly.

In fact, the school did use IDEA procedures to attempt to resolve its dispute, and the injuries alleged by the Frys here could have been raised then. In a

January 2010 IEP team meeting requested by the school, E.F.'s IEP team considered, among other questions, "[w]hat disability-related educational need the service animal [is] intended to address" and whether "the service animal [will] enhance or hinder [E.F.'s] ability to progress in the general curriculum[.]" The IEP team reached conclusions that pertain directly to the Frys' complaint: "[E.F.] was being successful in [the] school environment without the service animal, all of her needs were being met by the program and services in place, and adding the service animal would not be beneficial to [E.F.]." These statements either directly contradict the injuries alleged in the Frys' complaint or reflect an excessively narrow conception of educational success contradicted by the text of the IDEA. Either way, the Frys could have relied on the injuries alleged in the complaint here (or on the likelihood of those injuries arising in the future) to challenge the IEP team's conclusion under IDEA procedures.

Had the Frys pursued IDEA procedures at this point, they would have achieved one of two outcomes. Either they would have prevailed and effectively resolved their dispute without litigation, making it possible for E.F. to attend school with Wonder, or else they would have failed but in the process generated an administrative record that would have aided the district court in evaluating their complaint. The IDEA's purposes of giving state educational agencies the opportunity to ensure compliance with federal law and ensuring that local experts are able to analyze disputes before litigation begins are well served by requiring exhaustion here.

First, IDEA procedures would in fact have been capable of resolving the Frys' dispute. E.F.'s IEP already provided for a human aide to accompany her while at school; it could just as well have provided for her service animal. Further, as the Second Circuit in *Cave* has noted in similar circumstances, measures and policies designed to minimize the disruption caused by a service animal at school (a concern raised by school officials in refusing to permit Wonder to accompany E.F.) would also best be addressed through changes to an IEP. 514 F.3d at 247–48. The Frys' complaint alleges a basis under the IDEA for E.F. to attend school with Wonder, and IDEA procedures would have allowed the Frys and school officials to work out exactly how the school should adapt to Wonder's presence.

Second, the record IDEA procedures would have created in this dispute would have been directly relevant to analysis of the Frys' complaint under the ADA and the Rehabilitation Act. In order to prevail in their ADA claim, the Frys would have to show that permitting Wonder at school is "necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). Under the allegations in their complaint, this can be the case only because of Wonder's contribution to and role in E.F.'s education—an issue that would be extensively analyzed in IDEA procedures. The Frys would have to make a similar showing under the Rehabilitation Act. 20 U.S.C. § 794(a); 34 C.F.R. § 104.4. Thus the IDEA exhaustion requirement's purpose of allowing courts to benefit from the development of an administrative record also suggests that exhaustion should be required.

Although the Frys seek money damages, a remedy unavailable under the IDEA, rather than an injunction, this does not in itself excuse the exhaustion requirement. *F.H.*, 764 F.3d at 643; *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916 (6th Cir. 2000). Otherwise, plaintiffs could evade the exhaustion requirement simply by "appending a claim for damages." 205 F.3d at 917

It is true that IDEA procedures, which could at best require Ezra Eby Elementary to permit Wonder to accompany E.F. at school, would not at present be effective in resolving the Frys' dispute. First, E.F. no longer attends Ezra Eby Elementary, and her current school and school district permit Wonder to accompany her. Second, before the Frys decided to transfer E.F., the defendants settled the Frys' ADA complaint before the Department of Education's Office of Civil Rights and agreed to permit Wonder to accompany E.F. at school; IDEA procedures could not have produced a substantially better outcome.

On appeal, the Frys do not argue that, under *Covington*, the above circumstances render exhaustion of IDEA procedures futile. *See* 205 F.3d at 917–18. Indeed, their argument does not rely on the procedural posture of their dispute at all. We therefore cannot decide whether the exhaustion requirement should be excused as futile. However, it is far from clear that the Frys' circumstances satisfy the requirements for futility under *Covington*. In the "unique circumstances" of that case, we distinguished precedent that required exhaustion when relief under IDEA was unavailable due to the plaintiff parents' "unilateral act" of removing their child from the defendant school. *Id.* at 917, 918

(quoting *Doe v. Smith*, 879 F 2d 1340, 1343 (6th Cir. 1989)). That is, plaintiffs cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. While that is not exactly the case here, the Frys' failed to use IDEA procedures at any point during the almost two-and-a-half year period in which the school refused permission for Wonder to accompany E.F The plaintiff in *Covington*, in contrast, participated, albeit imperfectly, in the IDEA's appellate procedures prior to her son's graduating from the school where the dispute arose. *Id.* at 914. The Frys may thus bear some responsibility for the present inapplicability of IDEA procedures, and the futility doctrine may be inapplicable.

In arguing that the exhaustion requirement does not apply to their claim, the Frys rely chiefly on a federal district court decision in California in which the court refused to require exhaustion for a wheelchair-bound student's request for a service dog at school. *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F Supp. 947 (E.D. Cal. 1990). But applying that case's logic to this complaint would allow any ADA or Rehabilitation Act lawsuit to avoid the IDEA exhaustion requirement by not explicitly alleging a denial of a FAPE. The decision in *Sullivan* viewed a Rehabilitation Act claim as, in effect, asking questions distinct from those considered by IDEA procedures:

> [O]nce plaintiff has made a threshold showing that her decision to use the service dog is reasonably related to her disability, the sole issue to be decided under section 504 [of the Rehabilitation Act] is whether defendants are

> capable of accommodating plaintiff's choice to use a service dog. The issue of whether the service dog enhances plaintiff's educational opportunities, which is central to the EHA [the IDEA's predecessor] inquiry, is completely irrelevant under section 504.

Id. at 951. This logic does not hold, because, as explained above, having Wonder at school, in addition to a human aide, is "reasonably related" to E.F.'s disability only because Wonder "enhances [E.F.]'s educational opportunities." The analysis that would be necessary under the IDEA thus must be incorporated into the ADA and Rehabilitation Act analysis for the Frys to prevail under the latter statutes. The Frys do not in so many words state that Wonder enhances E.F.'s educational opportunities, but if this is enough to avoid the exhaustion requirement, then any carefully pleaded claim under the ADA or Rehabilitation Act could evade the exhaustion requirement.[1] But the text

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[1] At oral argument, the Frys proposed a somewhat more nuanced standard based on whether a disabled parent visiting the school would be entitled to the same accommodation as that sought by the student. This test was not articulated in the Frys' briefs, and it does not appear to be fully consistent with *F.H.* and *S.E.* Under those cases, whether a disabled student must exhaust IDEA procedures prior to bringing an ADA or Rehabilitation Act claim for a certain accommodation at school depends on whether the student's allegations relate to the denial of a FAPE or could be resolved through IDEA procedures. That a parent might justifiably claim a similar accommodation when visiting a school does not guarantee that the result of either of those inquiries will be negative, because the parent receives the accommodations in a different context (as an adult visitor, not as an everyday child attendee) and with different consequences.

of the IDEA exhaustion requirement clearly anticipates that the requirement will apply to some ADA and Rehabilitation Act claims. 20 U.S.C. § 1415(*l*). Instead, at minimum, the exhaustion requirement must apply when the cause of action "arise[s] as a result of a denial of a [FAPE]"—that is, when the legal injury alleged is in essence a violation of IDEA standards. *Payne*, 653 F.3d at 875.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting. The majority proposes to affirm the district court's order dismissing this civil rights action alleging violation of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), based on its conclusion that "the specific injuries the [plaintiffs] allege are essentially educational" and, therefore, subject to administrative exhaustion under an entirely separate statute, the Individuals with Disabilities Act (IDEA). Because I conclude to the contrary that the claim here is non-educational in nature and that the IDEA's exhaustion provision was improperly invoked by the district court, I respectfully dissent. Moreover, even if the accommodation sought could be considered "educational," the fact that school policy would permit a "guide dog" on campus, but not a certified "service dog," suggests why an attempt at exhaustion of administrative remedies would be futile in this case and should be excused.

The disability discrimination at issue is a text-book example of the harms that Section 504 and the ADA were designed to prevent, and the claims should not have been dismissed essentially because the victim of the discrimination was a school-aged child. Stacy and Brent Fry's daughter Ehlena, five years old when this dispute first arose in 2009, suffers from a severe form of cerebral palsy that is sufficiently disabling to qualify her under the IDEA for a "free appropriate public education" (FAPE) based on an individualized educational program (IEP)— one specifically "designed

to meet [her] unique needs." *Burilovich v. Bd. of Educ. of Lincoln Consol. Sch.*, 208 F.3d 560, 565 (6th Cir. 2000). Parents dissatisfied with a child's IEP are guaranteed "[a]n opportunity . . . to present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). If the complaint cannot be resolved, the parents are entitled to a due-process hearing and, if necessary, an appeal to the state's educational agency. 20 U.S.C. §§ 1415(f)(1)(A), 1415(f)(1)(B)(ii), 20 U.S.C. § 1415(g)(1). Failing that, suit against the school district may be filed in federal district court pursuant to 20 U.S.C. § 1415(i)(2).

In this case, the Frys did not attempt to exhaust their administrative remedies under the IDEA because they were not dissatisfied with Ehlena's educational program. Instead, their complaint stemmed from the school district's refusal to allow Ehlena's certified service dog, Wonder, to accompany her to school. Armed with a prescription from Ehlena's physician, the Frys had secured the dog at considerable expense through various community fund-raising efforts even before she started kindergarten, with the understanding that Ehlena would be able to have the service dog accompany her to school in the fall of 2009. In addition, the family had undergone ten days of specialized training at a service-animal training facility in Ohio. The ultimate objective was to form the child and the dog into a "team of two," with Wonder assisting Ehlena in myriad ways, including—but not limited to—"retrieving dropped items, helping her balance when she uses her walker, opening and closing doors,

turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet." In short, the goal was to help Ehlena develop more independent motor skills, which is not the function of an academic program—put bluntly, basic mobility is not a subject taught in elementary school. After the Frys completed training, what remained was the task of getting Ehlena and Wonder to become closely attached to one another in order to make the dog a valuable resource for the child, especially during non-school hours. Based on the advice of experts, her parents maintained that for Ehlena to develop the confidence necessary to achieve independent mobility, she and Wonder needed to be together around the clock, including during school hours.

School district officials contended that Ehlena already had an aide provided under her IEP and, therefore, did not need the additional assistance of a service animal. Indeed, they threatened to eliminate the human aide from the child's IEP if her parents insisted on having Wonder accompany Ehlena in school. Even more astounding, the school district refused to recognize Wonder as a service dog despite his official certification, possibly because school policy explicitly allowed "guide dogs"—but not "service dogs"—on school premises, giving lie to the claim that Wonder was objectionable because he might cause allergic reactions in staff members and students or become a distraction to others.

When officials at Ehlena's school repeatedly refused to accommodate the dog's presence, the Frys filed suit as her next friends, alleging that the school district had violated the child's civil rights under Section 504 of the

Rehabilitation Act, 29 U.S.C. § 791 *et seq.*; Title II of the ADA, 42 U.S.C. § 12101 *et seq.*; and the Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1101 *et seq.*[1] Title II applies to public entities and their programs, prohibiting exclusion from participation by and discrimination against qualified individuals with a disability "by reason of such disability." 42 U.S.C. § 12132. Moreover, ADA regulations require that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally* alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added). Similarly, the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding and requires reasonable accommodations to permit access to such recipient facilities and programs by disabled persons. *See* 29 U.S.C. § 794(a); 28 C.F.R. § 41.53.

Depending upon a disabled child's circumstances, the two anti-discrimination laws and the IDEA could function as complements, but their focus and the obligations that they impose are independent of one another. The ADA and the Rehabilitation Act guard Ehlena's civil rights, ensuring that she, like her fellow citizens, has equal access to public facilities and publicly-funded programs. By contrast, the IDEA guarantees that her education will be appropriate for her individual situation. If, for example, the school

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[1] The state claim was dismissed in the district court and is not involved in this appeal.

district declined to permit Ehlena to come to school altogether, that action would violate both the ADA and the Rehabilitation Act, by denying her access to a public facility and its publicly-funded program, and it would also violate the IDEA, by depriving her of a "free appropriate public education." On the other hand, if the school lacked ramps providing access to the building by someone using a wheelchair or walker, rectification of such an ADA violation would not likely be accomplished by modification of an IEP. In short, the ADA's focus is on ensuring *access*; the IDEA's focus is on providing *individualized* education. The point missed by both the district court and the majority is that for Ehlena, Wonder functions as an access *ramp*—not just in terms of the school building but, more significantly, in all aspects of her life.

This point was missed because the test applied below was impossibly broad. In granting the school district's motion to dismiss, the district court observed that "[it] fail[ed] to see how Wonder's presence would not—at least partially—implicate issues relating to E.F.'s IEP." But, this conclusion was based on nothing more than speculation, because the Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to "partially implicate" issues relating to education. If flimsy, however, the district court's "implication" analysis was at least a test. On appeal, the majority offers no useful yardstick at all. My colleagues appear to formulate something approaching a loose standard, observing that "having Wonder at school, in addition to a human aide, is 'reasonably related' to E.F.'s disability only because Wonder

'enhances [E.F.]'s educational opportunities.'" But the majority then quickly concedes that her parents "do not in so many words state that Wonder enhances E.F.'s educational opportunities."

Indeed, the Frys' complaint does not tie use of the service dog to Ehlena's academic program or seek to modify her IEP in any way. For this reason, the majority is also incorrect in asserting that "[t]he Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free and appropriate public education." The Frys did not allege the denial of a FAPE, only Ehlena's access to it. Moreover, given the total absence of discovery in this case, the contention that further accommodation through the service dog is unnecessary because Ehlena already has a "human aide" simply cannot be taken seriously. The aide provided under the IEP is *not* there to help Ehlena develop and maintain balance and mobility, but to ensure her ability to progress in her academic program. To equate that assistance with the function of the service dog, as the school district did and the majority appears to approve, is ludicrous, and it completely misconceives the purpose of providing an aide under an IEP Such an aide, after all, would be equally available to assist a special-needs child with no mobility problems at all.

If "implication" and "relatedness" are vague and unhelpful as standards for determining whether a Section 504 claim under the Rehabilitation Act or a Title II claim under the ADA must first be exhausted under the IDEA's administrative procedures, what test should apply? Although the majority quotes statutes at

length and cites very little case law, it does invoke the Ninth Circuit's opinion in *Payne v. Peninsula School District*, 653 F.3d 863, 875 (9th Cir 2011) (*en banc*), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (*en banc*), for the proposition that "at minimum, the exhaustion requirement must apply when the cause of action 'arise(s) as the result of the denial of a FAPE'—that is, when the legal injury alleged is in essence a violation of the IDEA standards." This proposition is, obviously, true. But it is immaterial, because the Frys neither alleged that Ehlena was denied a FAPE nor asked for a modification of her IEP Moreover, there is no proof in the record that what the Frys seek to redress is the functional equivalent of a deprivation under the IDEA.

Indeed, what *is* clear from the record—the complaint and attached exhibits—is that the request for a service dog would not require a modification of Ehlena's IEP, because that request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs*. That wholly reasonable accommodation—accomplished by a few keystrokes of a computer—would have saved months of wrangling between Ehlena's parents and school district officials; it would have prevented her absence from public school during the two years she was home-schooled following the school's decision; it would have avoided the disruption of relocating the child and her service dog to another school district; and it would have mooted the question of exhaustion and eliminated the necessity of litigation that has ensued since this action was filed.

On the other hand, if litigation was inevitable, then perhaps the majority in this case should look to the

Ninth Circuit's *en banc* opinion in *Payne* for more guidance than merely a restatement of the exhaustion provision found in 20 U.S.C. § 1415(*l*):

> [T]he exhaustion requirement in § 1415(*l*) is not a check-the-box kind of exercise. As our cases demonstrate, determining what has and what has not been exhausted under the IDEA's procedures may prove an inexact science. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302–03 (9th Cir.1992) (noting that the IDEA's exhaustion requirement "is not a rigid one, and is subject to certain exceptions," determined by "the general purposes of exhaustion and the congressional intent behind the administrative scheme"). In other words, the exhaustion requirement appears more flexible than a rigid jurisdictional limitation—questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the "general purposes" of exhaustion, are better addressed through a fact-specific assessment of the affirmative defense than through an inquiry about whether the court has the power to decide the case at all.

Payne, 653 F.3d at 870. In summary, the Ninth Circuit held, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*." *Id.* at 871 (emphasis added). In this vein, the court focused on Congress's intent as explicitly set out in the IDEA itself: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies

available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities " 20 U.S.C. § 1415(*l*). This deliberate carve-out would have no meaning if any and every aspect of a child's development could be said to be "educational" and, therefore, related to a FAPE, requiring inclusion in an IEP, and imposing an extra impediment to the remediation of a disabled child's civil rights. As the *Payne* court noted, "§ 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under § 1983 or other federal laws." *Payne*, 653 F.3d at 872.

The majority here has told us that "[d]eveloping a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal" but has failed to tell us how it reached this conclusion. The omission is not entirely surprising, given that the *Payne* court identified the Sixth Circuit as one of the "courts [that] have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies." *Id.* at 874. In developing such a standard for itself, the Ninth Circuit abandoned an injury-centered approach, in which IDEA's exhaustion requirement would apply to any case in which the injuries alleged could be redressed to any degree by the IDEA's administrative procedures, in favor of a relief-centered approach requiring exhaustion in three situations: (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent"—for example, when "a disabled student

files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education;" (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student;" and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action . ." *Id.* at 875. Because the Frys do not seek to "alter an IEP" or to rectify "the denial of a FAPE," a court adopting the *Payne* approach would be left with this question: is their request for the service dog under the circumstances of this case "the functional equivalent of an IDEA remedy"?

The answer to this question involves the very purpose of the IDEA's exhaustion requirement, which "is designed to allow for the exercise of discretion and educational expertise by state and local agencies, [to] afford full exploration of *technical educational issues*, [to] further development of a complete factual record, and [to] promote judicial efficiency by giving agencies the first opportunity to correct shortcomings in their *educational programs* for disabled children." *Id.* at 875-76 (internal quotation marks, grammatical alterations, and citation omitted; emphasis added). In short, the exhaustion provision in Section 1415(*l*) is intended to insure that education experts make the "expert determinations about the best way to educate disabled students." *Id.* at 876 (emphasis added).

Clearly, an "expert determination" about "technical educational issues" might well concern whether a

handicapped student could be mainstreamed or would fare better in a special-education classroom. It might also concern whether speech therapy would help a child struggling with autism to communicate. And, it might concern whether an intellectually-challenged student could learn to read with the assistance of a reading specialist. But it would *not* concern whether a deaf child should be equipped with a cochlear implant or relegated to learning sign language; whether a blind child should be furnished with a guide dog or outfitted with a white cane; or whether a crippled child should be confined to a wheelchair or encouraged to use a walker *assisted in balance and navigation by a service dog*. The experts qualified to make the "technical decisions" for children in the latter group are obviously *not* trained educators but their physicians and physical therapists. In fact, it was Ehlena's pediatrician who originally assessed her need for a service dog and wrote a prescription that allowed the Frys to provide Ehlena with Wonder. The school district's failure to allow Wonder to accompany Ehlena in school was no different from denying her the use of a wheelchair, if one were needed to enable her to achieve mobility.

Rather than ask a state agency to make that call, the Frys submitted their claim to federal authorities in July 2010, by filing a complaint with the United States Department of Education's Office for Civil Rights (OCR), the federal agency responsible for enforcing Section 504 of the Rehabilitation Act and Title II of the ADA. The complaint was based on the school district's interference with Ehlena's access to its publicly-funded school program by refusing to allow her "trained service animal" to accompany her in school. In a report dated May 3, 2012, the Director of the Office for Civil

Rights indicated that current Title II regulations require that "*public entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability*." Moreover, the regulations in effect at the time defined "service animals" to include "any guide dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." The report also notes that a "public entity is required to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public, participants in services, programs, or activities; or invitees, as relevant, are allowed to go."

Addressing Ehlena's situation specifically, the OCR Director summarized a letter from Ehlena's physical therapists:

> [T]he therapists explained how the service animal [Wonder] had accompanied the Student to therapy since November of 2009 and had been incorporated into therapy in a number of ways. For example, the service animal assisted the Student with directional control of her walker, with ambulation, and with stabilizing herself while transitioning into and out of her walker from the floor. The Student used the service animal as a bridge for transitioning from her walker to a standing or seated position at a table. She also consistently used the service

> animal safely to improve her sitting balance by having the service animal provide posterior support as needed. The letter also described how the service animal was directed behind or to the side of the Student when she was standing at a supportive surface for improved safety. Additionally, the Therapists explained that the Student used the service animal to safely pick up dropped items. The letter stated that, although the Student still needed adult stand-by assistance for added safety, her independence with transitioning was improving.

Nevertheless, the OCR Director noted, Ehlena's school district "assert[ed] that the Student does not need her service animal for school, because they will provide her a human aide," but if they do, "it will violate the antidiscrimination provisions of Section 504 and Title II." The Director added:

> [T]he decision to deny the Student the service animal in the school setting would have wider implications for the Student outside of the school day. Activities that the service animal performs for the Student during school, such as providing assistance with balance and support, retrieving dropped items, and taking off her coat, are the same types of activities for which the Student uses the service animal outside of the school
>
> Th[e] evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a year, would result in a more prolonged and complete separation that would likely cause

> the Student's working relationship with the service animal to deteriorate.

When the school district refused to accept the factual findings and the legal conclusions in the OCR report, the Frys filed this action in district court.

It is difficult to fathom what could have been gained by requiring the Frys to undergo additional "exhaustion" before filing suit. The stupefying fact, as noted previously, is that the school district's policy would explicitly have permitted Ehlena to have a guide dog at school if she were blind, but was not interpreted to allow the use of a service dog as a reasonable accommodation for her mobility handicap—even in the face of federal regulations establishing that any distinction between a guide dog and a service dog is purely semantic. Moreover, the school district's recalcitrance suggests a possible reason for the Frys' decision to pass up the bureaucratic process involved in pursuing Section 1415(*l*) exhaustion as futile, given their repeated efforts to reach a favorable accommodation with the school district officials and their lack of success, even with the OCR report in hand. Of course, we cannot know why the Frys decided to file suit rather than seek a due-process hearing, because the district court dismissed the action on the pleadings, thereby short-circuiting the case before the complaint was answered and discovery could occur.

In my judgment, the district court's dismissal was inappropriately premature. When the court granted the school district's motion for judgment on the pleadings, the pleadings were closed, as required by Federal Rule of Civil Procedure 12(c), but discovery had not been undertaken. And yet, Sixth Circuit case law recognizes

that "exhaustion is not required under the IDEA in certain circumstances . [for example, where] it would be futile or inadequate to protect the plaintiff's rights." *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) (citing *Honig v. Doe*, 484 U.S. 305, 326-27 (1988)). Although "the burden of demonstrating futility or inadequacy rests on the party seeking to bypass the administrative procedures," *id.*, the necessity of making such a showing presumes that a plaintiff's civil-rights action setting out Section 504 and ADA claims will proceed at least to the summary judgment stage, as it did in *Covington*. It follows that the district court's order dismissing the Frys' complaint was inappropriate at best, arguably erroneous, and not worthy of affirmance.

At the very least, this case should be remanded to the district court to permit the Frys to attempt a showing that Section 1415(*l*) exhaustion was inapplicable to their case or that it would have been "futile or inadequate." From the majority's decision to affirm, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed June 12, 2015]

STACY FRY and BRENT FRY, as next friends of minor E.F., Plaintiffs Appellants,	)
v	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, Defendants Appellees.	)

Before: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.12-15507
Hon. Lawrence P. Zatkoff

[Filed January 10, 2014]

EF, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiffs,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Port Huron, State of Michigan, on January 10, 2014

PRESENT: THE HONORABLE LAWRENCE P ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss [dkt 17]. The parties have fully briefed the Motion. The Court finds that the facts and legal arguments are adequately presented in the parties' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(f)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted, without oral argument. For the following reasons, Defendants' Motion is GRANTED.

II. BACKGROUND

A. FACTUAL BACKGROUND

EF, an eight-year-old girl, was born with spastic quadriplegic cerebral palsy, the most severe form of that disorder. Spastic quadriplegic cerebral palsy affects EF's legs, arms, and body, and significantly limits her motor skills and mobility. She is not cognitive impaired, however, but requires physical assistance in her daily activities.

On or about May 2008, EF's pediatrician wrote a prescription for a service dog to assist her in everyday activities. Before EF enrolled in Ezra Eby Elementary School's kindergarten program for the 2009–10 school year, Plaintiffs (EF's parents) informed Defendants[1] Napoleon Community Schools and Jackson County

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[1] Plaintiffs only brought one claim (Count III) against Defendant Pamela Barnes. The Court, however, dismissed that claim on January 18, 2013. Accordingly, Defendant Pamela Barnes is no longer a party to this suit.

Intermediate School District ("Defendants") that they intended to obtain a service dog for EF. Defendants allegedly "led [Plaintiffs] to believe that the service dog could attend school with [EF]." With the success of a local community fundraiser, EF and Plaintiffs were able to pay for the training of a service dog named "Wonder."[2] In the fall of 2009, EF and her family trained with Wonder at service animal training facility in Ohio.

According to Plaintiffs, Wonder "is a specially trained and certified service dog and assists [EF] in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, helping her transfer to and from the toilet." Dkt. # 1, ¶ 27. Wonder also "enables [EF] to develop independence and confidence and helps her bridge social barriers." *Id.* at ¶ 28.

In October 2009, Defendants informed Plaintiffs that Wonder could not accompany EF to school. On January 7, 2010, Defendants convened a meeting wherein the Individual Educational Program ("IEP") team considered whether Wonder was necessary to provide EF with a free appropriate public education ("FAPE").[3] The IEP team concluded that EF was

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[2] Wonder is a Goldendoodle, a cross between a Golden Retriever and a Poodle. Most Goldendoodles have a low or non-shedding coat, which generally makes the breed tolerable for people with allergies.

[3] Under the Individuals with Disabilities Act, the means by which a state provides special education services is through the

successful in the school environment without Wonder, and that all of her "physical and academic" needs were being met by the IEP program and services in place. *Id.* at ¶¶ 32–33. Subsequent to that decision, Plaintiffs and Defendants negotiated an agreement whereby EF was allowed to bring Wonder to school for a 30-day trial period that commenced on April 12, 2010, and was ultimately extended through the end of the school year. Although Wonder was permitted in school, Plaintiffs allege that Defendants required Wonder "to remain in the back of the room during classes," "forbade [him] from assisting [EF] with many tasks he had been specifically trained to do," "refused to allow [him] to accompany and assist [EF] during recess, lunch, computer lab and library," and "prohibited [EF] from participating in other activities with Wonder such as walking the track during 'Relay for Life,' a school play and 'field day.'" *Id.* at ¶¶ 35–37. Following the trial period, Defendants not only refused to modify the school's policies, but also refused to recognize Wonder as a service dog.

Plaintiffs filed a complaint with the United States Department of Education Office of Civil Rights ("OCR") on July 30, 2010. On May 3, 2012, the OCR issued a disposition letter finding that EF's school district and intermediate school district (*i.e.*, Defendants) violated her rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the federal regulations implementing those laws. Attempting to find an amicable resolution to the OCR complaint, Defendants entered into a resolution

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development of IEP's that are individually tailored to the unique needs of each student.

agreement wherein EF could return to the elementary school with Wonder and could utilize the dog to assist her throughout the school.

Plaintiff Brent Fry conversed with Defendant Pamela Barnes during the summer of 2012 to discuss EF's return with Wonder According to Plaintiffs, that conversation evoked "serious concerns that the administration would resent" EF Plaintiffs located a different public school in Washtenaw County for EF to attend with Wonder [4]

B. Procedural Background

Plaintiffs filed their three-count complaint on December 17, 2012, alleging the following causes of action: violation of Section 504 of the Rehabilitation Act against Defendants Napoleon Community Schools and Jackson County Intermediate School District (Count I); violation of Title II of the Americans with Disabilities Act against Defendants Napoleon Community Schools and Jackson County Intermediate School District (Count II); and violation of the Michigan Persons with Disabilities Civil Rights Act against all Defendants (Count III). On January 18, 2013, the Court dismissed Plaintiffs' state-law claim (Count III).

Pending before the Court is Defendants' motion seeking dismissal of Plaintiffs' remaining federal claims.

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[4] While awaiting a ruling from the OCR, Plaintiffs homeschooled EF

III. LEGAL STANDARD

Pursuant to Fed. R. Civ P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The Court's review under Fed. R. Civ. P 12(c) is the same as the review under Fed. R. Civ P 12(b)(6). *Jelovsek v. Bredesen*, 545 F.3d 431, 434 (6th Cir. 2008). Under Fed. R. Civ P 12(b)(6), the Court must accept as true all factual allegations in the pleadings, and any ambiguities must be resolved in that plaintiff's favor. *See Jackson v. Richards Med. Co.*, 961 F.2d 575, 577–78 (6th Cir. 1992). While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. *See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 319 (6th Cir. 1999). Thus, the plaintiff must make "a showing, rather than a blanket assertion of entitlement to relief" and "[f]actual allegations must be enough to raise a right to relief above the speculative level" so that the claim is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

IV. ANALYSIS

The crux of the parties' dispute is narrow and relatively straightforward. Defendants argue Plaintiffs failed to exhaust their administrative remedies with the Michigan Department of Education before filing this federal suit and, as a result, their federal claims should be dismissed. Plaintiffs, on the other hand, dispute that they were required to adhere to the exhaustion requirement. The Court finds Defendants' position meritorious as further explained below.

A. Individuals with Disabilities Act

The Individuals with Disabilities Act ("IDEA") conditions a state's receipt of federal funding upon the state's development and implementation of policies and procedures ensuring that "[a] free appropriate public education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). The central means by which a state provides this education is through the development of an IEP that is tailored to the unique needs of a particular child. *Id.* at § 1412(a)(4); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982).

The IDEA requires a parent, dissatisfied with an education decision regarding her child, to exhaust state administrative remedies before proceeding to federal court. *Id.* at § 1415(l);[5] *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989)

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[5] 20 U.S.C. § 1415(l) provides as follows:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Subsection (f) provides for an "impartial due process hearing" and subsection (g) provides for an appeal to the state educational agency "[i]f the hearing required by subsection (f) of this section is conducted by a local education agency." 20 U.S.C. §§ 1415(f) & 1415(g)(1).

("Every court that has considered the question has read this statutory scheme as a requirement for the exhaustion of administrative remedies."). Exhaustion is an affirmative defense that must be raised by the defendant. *See, e.g.*, *B.H. v. Portage Pub. Sch. Bd. of Educ.*, No. 08-293, 2009 WL 277051, at *3 (W.D. Mich. Feb. 2, 2009).

The IDEA's exhaustion requirement is not limited to claims brought under the IDEA. Section 1415(l) of the IDEA states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action *under such laws seeking relief that is also available under this subchapter*, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l) (emphasis added). "[T]he IDEA exhaustion requirement applies to claims brought under the Rehabilitation Act or other federal statutes to the extent those claims seek relief that is also available under the IDEA." *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008). As summarized by one court, exhaustion is required in three IDEA-related contexts:

First, exhaustion is clearly required when a plaintiff seeks an IDEA remedy or its functional equivalent. For example, if a disabled student files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education, the IDEA requires exhaustion regardless of whether such a remedy is available under the ADA, or whether the IDEA is mentioned in the prayer for relief.

* * *

Second, the IDEA requires exhaustion in cases where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student.

* * *

Third, exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a [free appropriate public education] to provide the basis for the cause of action (for instance, a claim for damages under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, premised on a denial of a [free appropriate public education]). Such claims arise under either the IDEA (if the IDEA violation is alleged directly) or its substantive standards (if a § 504 claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is

> therefore "available under this subchapter " 20 U.S.C. § 1415(l).

Payne, 653 F.3d at 875.

Thus it is irrelevant that Plaintiffs did not expressly plead an IDEA claim. In order to determine if Plaintiffs were required to exhaust their federal claims before filing suit, this Court must first examine the relief requested in Plaintiffs' complaint. If the relief sought by Plaintiffs could have been provided by the IDEA, then exhaustion was necessary and Plaintiffs' complaint must be dismissed.

In the current matter, Plaintiffs allege two federal claims: (1) a violation of Section 504 of the Rehabilitation Act; and (2) a violation of Title II of the ADA. Plaintiffs' complaint, though, does not explicitly link each claim to a separate form of requested relief. Rather, the complaint contains a general "Request for Relief," which includes issuance of a declaration that Defendants violated Plaintiffs' rights under the above-mentioned statutes, an award of damages in an amount to be determined at trial and attorney's fees.

First, Plaintiffs' request for attorney's fees is indeed available under the IDEA. *See* 20 U.S.C. § 1415(i)(3)(B). Moreover, the inclusion of compensatory damages likewise provides no safe harbor from the IDEA's exhaustion mandate. The Sixth Circuit—in conformity with the majority of other circuits—has held that plaintiffs cannot evade the exhaustion requirement simply by limiting their prayer for relief to a request for damages. *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) ("[W]e agree with those courts that have decided that

a mere claim for money damages is not sufficient to render exhaustion of administrative remedies unnecessary "). Accordingly, this Court must look beyond the "damages" and "attorney's fees" request and carefully discern the theory or underpinnings behind Plaintiffs' allegations in order to determine if exhaustion under the IDEA is required. *See Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246 (2nd Cir. 2008) ("[T]he theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply ") (quotations and citation omitted).

Instructive is the Second Circuit's decision in *Cave*, *supra*, a case involving a hearing-impaired student's request to allow a service dog to accompany him to school. The student's request was denied by school officials because the student's class schedule and overall education program would have required modification. Much like the instant case, the appellants in *Cave* argued that their claim was not one of violation of the IDEA's mandate for the provision of a FAPE, but was rather a claim for unlawful discrimination under the ADA and Rehabilitation Act, among others statutes. There, the school officials' decision was upheld because the court was not convinced that the student's claims were materially distinguishable from claims falling within the ambit of the IDEA:

> The high school principal and the school district's director of special education testified before the district court that John, Jr.'s class schedule under his existing IEP would have to be changed to accommodate the concerns of allergic students and teachers and to diminish

> the distractions that Simba's [*i.e.*, the service dog] presence would engender. (citation omitted). School authorities would also have to make certain practical arrangements to maintain the smooth functioning of the school and to ensure both that Simba was receiving proper care and that John, Jr continued to receive necessary and appropriate educational and support services. (citation omitted). It is hard to imagine, for example, how John, Jr could still attend the physical education class while at the same time attending to the dog's needs; or how he could bring Simba to a class where another student with a certified allergic reaction to dogs would be present. (citation omitted). These issues implicate John, Jr.'s IEP and would be best dealt with through the administrative process.
>
> We thus agree with the district court here that 'at least in part, the plaintiffs are challenging the adequacy of John, Jr.'s IEP because it does not include a service dog.' (citation omitted). The relief appellants seek, 'namely permission to bring the service dog to school, is in substance a modification of John, Jr.'s IEP [and] is available under the IDEA.' (citation omitted).

Cave, 514 F.3d at 247–48.

Here, Plaintiffs' response brief strongly disclaims any challenge to the efficacy of EF's IEP As Plaintiffs would have it, they are instead arguing that Defendants' failure to accommodate a disabled individual (*i.e.*, EF) in a place of public accommodation (*i.e.*, EF's school) violates the ADA and Rehabilitation

Act. Put another way, Defendants' obligation to satisfy those statutes "was entirely separate from the Defendants' obligation to provide a [FAPE] under the IDEA." *See* Dkt. # 18, p. 15–16 ("The education program created by the Defendants with input from [EF's] family and medical providers did provide the educational opportunity that is required as a matter of law."); ("The IDEA addresses only the Defendants' obligation to formulate a plan to provide a student with a [FAPE].").

The Court concludes that the IDEA's exhaustion requirement was triggered here. Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder's presence would not—at least partially—implicate issues relating to EF's IEP Borrowing from the discussion in *Cave*, it appears conceivable that EF's IEP would undergo some modification, for example, to accommodate the "concerns of allergic students and teachers and to diminish the distractions [Wonder's] presence would engender." Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (*i.e.*, the school and school district) would also have to make certain practical arrangements—such as developing a plan for Wonder's care, including supervision, feeding, and toileting—so that the school continued to maintain functionality. All of these things undoubtedly implicate EF's IEP and would be best dealt with through the administrative process.

As one panel from within the Sixth Circuit has aptly commented: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). In brief, the Court finds that Plaintiffs were obliged to exhaust the administrative remedies available under the IDEA before filing the current lawsuit. Accordingly, because Plaintiffs' do not contest that they failed to exhaust the IDEA's administrative remedies, Plaintiff's complaint will be dismissed without prejudice.

V. CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [dkt 17] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's complaint [dkt 1] is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Date: January 10, 2014

s/Lawrence P. Zatkoff
Hon. Lawrence P. Zatkoff
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.12-15507
Hon. Lawrence P. Zatkoff

[Filed January 10, 2014]

EF, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiffs,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Opinion and Order dated January 10, 2014, this cause of action is DISMISSED WITHOUT PREJUDICE.

Dated at Port Huron, Michigan, this 10th day of January, 2014.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marie Verlinde
MARIE VERLINDE

APPROVED:

s/Lawrence P. Zatkoff
LAWRENCE P ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed August 5, 2015]

STACY FRY AND BRENT FRY, AS NEXT FRIENDS OF MINOR E.F.,	)
Plaintiffs-Appellants,	)
v.	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT,	)
Defendants-Appellees.	)

ORDER

BEFORE: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

Judge White recused herself from participation in this ruling.

APPENDIX D

STATUTES AND REGULATION

20 U.S.C. § 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational

agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by

which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall

provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and

regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local

educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void

such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing

may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause

of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may

be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall

review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that

resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless

the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child,

that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to

children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(*o*) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is

extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural

alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

---

[1] See References in Text note below.

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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[1] See References in Text note below.

42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and

requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

28 C.F.R. § 35.136 Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability

(b) *Exceptions.* A public entity may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.*, voice control, signals, or other effective means).

(e) *Care or supervision.* A public entity is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.*, the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a public entity.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges.* A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(i) *Miniature horses.* (1) *Reasonable modifications.* A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a

miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) *Other requirements.* Paragraphs 35.136(c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

FILED
DEC 18 2015
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No. 15-497

In The
Supreme Court of the United States

STACY FRY, BRENT FRY, E.F., a minor,
by her next friends, Stacy Fry and Brent Fry,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS,
PAMELA BARNES, AND JACKSON COUNTY
INTERMEDIATE SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

TIMOTHY J. MULLINS
Counsel of Record
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
kchapic@gmhlaw.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

The Individuals with Disabilities Education Act ("IDEA") requires a party to exhaust the IDEA's administrative procedures before filing a civil action under a different statutory scheme, if relief is "also available under [the IDEA]." Petitioners have filed suit under the Americans with Disabilities Act and Rehabilitation Act relating to an educational accommodation they requested as part of their daughter's special education program. The issue presented is:

> Whether Petitioners were required to exhaust Individuals with Disabilities Education Act administrative procedures regarding a dispute over the accommodation requested during an IEP team meeting, where the requested accommodation is educational in nature, and can be remedied to some degree by IDEA procedures.

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RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant portions of the Individuals with Disabilities Education Act and Title 34. Education of the Code of Federal Regulations are reprinted in the appendix to this brief. Petitioners reprinted the Handicapped Children's Protection Act of 1986 in their Petition at App. 55.

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415(l), expressly requires families to exhaust IDEA administrative remedies before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. Petitioners brought suit under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act relating to dispute over an educational accommodation they requested during a meeting to amend their daughter's Individualized Education Program.

FACTS

E.F. is a 12-year-old, former student at Napoleon Community Schools and Jackson County Intermediate School District.[1] Record Entry 1, Page ID 1, ¶2.

[1] E.F. attended Napoleon Community Schools. Napoleon Community Schools is one of twelve constituent public school

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E.F. is diagnosed with multiple medical conditions. As a result, while attending Respondents' schools, E.F. was eligible for and received special education services under the IDEA, 20 U.S.C. §1400, et seq. *Id.* at Page ID 4, ¶19. E.F. received special education services through her Individualized Education Program ("IEP").[2] *Id.* at Page ID, ¶33.

In the fall of 2009, Petitioners requested that the Respondents allow a service animal named "Wonder" to accompany E.F. at school. *Id.* at Page ID 6, ¶¶32-33. Petitioners "'requested a service dog for their daughter to enhance her independence.'" *Id.* at ¶33. Enhancing independence is a stated goal of special education under the IDEA. 20 U.S.C. §1400(d)(1)(A). A request for a disabled student "[t]o use . . . a service animal" is also a specifically identified IDEA "related service," 34 C.F.R. §300.34(7)(ii), and a form of "travel training" under the IDEA. 34 C.F.R. §300.39(b)(4)(ii).

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districts of Jackson County Intermediate School District ("The JCISD"). The JCISD provides special education support for all schools in Jackson County.

[2] Under the IDEA, the IEP is the central means by which a school district provides special education services to disabled students. 20 U.S.C. §1412(a)(4). The IEP is, in brief, a comprehensive statement of the educational needs of a handicapped child, and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. §1401(19). IEPs are created by IEP teams, which include teachers, administrators, parents, and medical professionals. 20 U.S.C. §1414(d)(1)(B). IEP teams convene to discuss the disabled student's individual needs, and based on these discussions, develop an IEP that is individually tailored to the unique needs of the particular student.

In January 2010, the School convened an IEP team meeting to consider E.F.'s need for a service animal. *Id.* at Page ID 6, ¶32. Petitioners claim that the purpose for requesting the dog was examined during the IEP meeting, but "the request was denied because the IEP team determined that E.F.'s 'physical and academic needs are being met through the services/programs/accommodations of the IEP.'" *Id.* at Page ID 6, ¶33. Members of the IEP team believed that the human aide the school provided as part of her IEP satisfied E.F.'s needs. Petitioners claim that the denial of this IDEA service resulted in E.F.'s home-schooling. *Id.* at Page ID 2, 6, ¶¶6, 34-35. This is, in essence, an allegation that E.F. was prevented from receiving a free appropriate public education ("FAPE"). *See* 20 U.S.C. §1401(9). Respondent Jackson Intermediate School District remained responsible for providing special education services to E.F. while she was homeschooled. *See* MCL 388.1709; Michigan Administrative Rule 340.5.

Petitioners, who were represented by legal counsel at the time, concede that they never exhausted their IDEA procedures by requesting an impartial due process hearing relating to their request. *See* 20 U.S.C. §1415(f)-(g). Petitioners instead filed a complaint with the Office of Civil Rights ("OCR").[3]

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[3] Filing a complaint with OCR does not satisfy IDEA exhaustion requirements. *See* 20 U.S.C. §1415(f)-(g). It is not the state or local *educational* agency identified in the IDEA. The purpose of an OCR investigation is different than that of the

(Continued on following page)

Ultimately, OCR took more than two years to complete its investigation.

The dispute whether Wonder could accompany E.F. to school continued for nearly three years without Petitioners utilizing IDEA procedures. Had they done so, the dispute could have been resolved in less than 105 days. 20 U.S.C. §1415(g); 34 C.F.R. §300.515(b). Most, if not all, of the alleged harm could have been avoided during that timeframe.

Ultimately, Petitioners enrolled E.F. in a different school district for the 2012/2013 school year.

PROCEDURAL HISTORY

On December 17, 2012, Petitioners filed suit relating to accommodations specifically requested during E.F.'s specially convened January 2010 IEP. The lawsuit claimed that E.F. was denied the accommodation requested during the IEP meeting. Record Entry 1, Page ID 6, ¶¶32,33. Petitioners filed suit "seeking damages for the school's refusal to accommodate Wonder between Fall 2009 and Spring 2012," the entire period of time Respondent Jackson County Intermediate School District was responsible for

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impartial due process hearing procedure under the IDEA. OCR also does not provide "special education experts" to preside over disputes. 20 U.S.C. §1415(f)(3). Thus, the Court would not receive the same benefit of expert fact-finding from OCR as it would from the state agency.

providing special education services to EF. In their lawsuit, and contrary to Petitioners' current claim, Petitioners specifically requested "***any***" relief the Court determines appropriate. *Id.* at Page ID 16, ¶E.

On January 10, 2014, the District Court dismissed Petitioners' lawsuit for failing to exhaust IDEA procedures before filing suit. On June 12, 2015, the Sixth Circuit affirmed the dismissal in a split decision. The Majority Opinion found that §1415(l) requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA. The Majority then held that the IDEA exhaustion requirement applies to Petitioners' claim because the core harms in their lawsuit alleged relate to the specific educational purpose of the IDEA, and therefore could be redressed by some degree by the IDEA's procedures.

On June 26, 2015, Petitioners requested *en banc* review. Petitioners claimed that the Majority Opinion was incorrect because Petitioners sought "only compensatory damages for the social and emotional harm caused by the School" that were not available under the IDEA. Petitioners' Complaint, however, clearly requested "any" relief the Court determines appropriate, which includes injunctive relief available under the IDEA. On August 5, 2015, the request for rehearing *en banc* was denied.

REASONS TO DENY THE PETITION

The IDEA expressly requires families to exhaust administrative remedies under the IDEA before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. 20 U.S.C. §1415(l).

Every circuit interpreting §1415(l) has held that families raising grievances relating to the education of disabled children are required to exhaust administrative remedies before filing suit in federal court if the IDEA can provide some remedy. This is true even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. To determine whether relief is available, these circuit courts have consistently looked to the nature of the plaintiff's factual complaints and injuries; not just the wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. These circuits have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages.

Petitioners' request for review is based on the false premise that a single decision from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011), establishes a circuit split when

exhaustion is required. There is no circuit split. Contrary to Petitioner's assertion, this single decision is no different in substance than the other circuits. *Payne* still requires families to exhaust administrative remedies under the IDEA, even if they bring suit under a different statute, such as the ADA or the Rehabilitation Act. 653 F.3d at 875. *Payne* also calls for an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued. *Id.* at 880. *Payne*, in fact, found that lawsuits arising from the denial of a free appropriate public education must be exhausted, no matter how they are pled, and no matter what relief was expressly requested. *Id.* And like every circuit to address the issue, *Payne* finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages, as Petitioners have advocated. *Id.* at 877.

Petitioners were required to exhaust IDEA administrative procedures in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training," and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Petitioners claim that the implementation of this educational program for E.F. absent the dog resulted

in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building. These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum of a "related service" to foster independent living.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, also claiming that *Payne* created a circuit split. This Court denied the Petition. Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the substance of the plaintiffs' claim to determine whether exhaustion was required, as held by the First, Second, Third, Sixth Seventh, Tenth, and Eleventh Circuits – and *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no circuit court cases have relied on *Payne* in the manner Petitioner interprets this decision.

I. The Individuals With Disabilities Education Act

Petitioners argue that exhaustion of IDEA administrative procedures is not required in this case because "E.F. did not seek an IDEA remedy or its functional equivalent, seek prospective relief to alter her IEP or educational placement, or raise any claim that relied on the denial of a free appropriate public education." *See* Page 17 of Petition. Petitioners appear to concede that exhaustion would have been required had E.F. raised one of the above claims. E.F. had in fact raised all three claims.[4] Petitioners' assertion that such relief was not requested is based on a misunderstanding of the IDEA, and what remedies are available under the IDEA.

A. The IDEA

The IDEA is the federal statutory scheme that governs the education of disabled students. 20 U.S.C. §1400, et seq.; 34 C.F.R. §300.1, et seq. The core purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. §1400(d)(1)(A). The term free appropriate public education ("FAPE") is comprised of two elements, 1) special education,

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[4] Contrary to Petitioner's assertion, this lawsuit arises from their request to alter E.F.'s IEP on January 10, 2010, seeks "any" relief the court determines is appropriate, and alleges she was denied an element of a FAPE.

and 2) related services. 20 U.S.C. §1401(9). Needless to say, a disabled student has been denied a FAPE if a school fails to provide either an appropriate education, or a needed related service. Disabled students receive their special education curriculum and related services through their IEP. 20 U.S.C. §14012(a)(4).

It is important to note that FAPE (and, thus, "special education" and "related services") encompasses more than simply academics. The IDEA's goal is that disabled students receive a special education curriculum and related services that are "designed to meet their unique needs and prepare them for further education, employment, **and independent living**." 20 U.S.C. §1400(d)(1)(A) (emphasis added).

"Special education" is defined, in part, as a specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. 34 C.F.R. §300.39(a). In light of the above goal, special education is also defined as pathology services, vocational training, and "travel training." *Id.* at §300.39(a)(2). "Travel training" is "instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community)." 34 C.F.R. §300.39(b)(4)(ii). Therefore, a request for a service

animal to assist E.F. to travel within the school building, to gain independence, is by definition part of her special education curriculum.

"Related services" is defined by the IDEA as an accommodation that allows a disabled student to benefit from special education. 20 U.S.C. §1401(26); 34 C.F.R. §300.34. Related services help children with disabilities benefit from their special education by providing extra help and support in needed areas, such as speaking or moving.

The scope of "related services" is expansive. The IDEA expressly states that related services can include, but are not limited to, any of the following: speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; medical services for diagnostic or evaluation purposes; school health services and school nurse services; social work services in schools; parent counseling and training; and transportation.

Of particular importance to Petitioners' claim, the IDEA also defines "related services" as "orientation and mobility services." 20 U.S.C. §1401(26). Orientation and mobility services are used to "attain systemic orientation to and safe movement with [the student's] environments in school, home, and community." 34 C.F.R. §300.34(7)(i). The IDEA expressly

provides that teaching a disabled child to use a "service animal" is an IDEA orientation and mobility related service. *Id.* at §300.34(7)(ii)(B). "Transportation" related services is defined as assistance with "travel in and around school buildings." *Id.* at §300.34(16). Thus, Petitioners' request for a service animal to assist E.F. with travel around the school is within the scope of the definition of a FAPE. This fact warrants the denial of Petitioners' claim.

The IDEA also requires schools to provide disabled students "transition services," which is a curriculum or related service to prepare them for "post-school activities" and "independent living." 20 U.S.C. §1401(34); 34 C.F.R. §300.39, §300.43, §300.320(b) (requiring transition planning begin at the earliest age appropriate, and no later than age 14). For each student with a disability, the IEP must include a statement of the student's transition service needs that focuses on the student's particular needs. *Id.* Thus, the IEP team must determine what instruction, related services, and educational experiences will help the student prepare for the transition from school to adult life. For example, if a student's transition goal is to secure a job, a transition service need might be enrolling in a career development class to explore career options and specific jobs related to that career. As another example, the Second Circuit found that, under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme." *Cave v. East Meadow Union Free School District*, 514 F.3d 240 (2d Cir. 2008).

Therefore, under the IDEA, a request for a service animal to assist a disabled student is: part of a special education curriculum related to "travel training"; a "related service," to help a disabled student benefit from a special education curriculum while in school; a related service to promote independence at home and in the community; and a transition service to prepare a disabled student for "post-school activities" and "independent living." Thus, Petitioners' request in this case directly relates to E.F.'s access to a FAPE.

B. Remedies Available Under IDEA

Another stated purpose of the IDEA is to ensure "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(B). The IDEA provides recourse to disabled students who are denied an education or related service.

To ensure that children with disabilities are being afforded all of the educational benefits of the statute, the IDEA provides parents with an opportunity to lodge formal complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* at §1415(b)(6). A complaining parent has recourse to an impartial due process hearing conducted by either the local or state educational agency, *Id.* at §1415(f), and the right to appeal any finding or decision reached in the hearing. *Id.* at §1415(g).

The IDEA administrative procedure requires that each due process proceeding is administered by an expert in special education laws and issues. 20 U.S.C. §1415(f)(3)(A). During a due process hearing, the special education expert is charged with developing a detailed factual record using the hearing officer's expertise in special education. 20 U.S.C. §1415(f)(3)(D). This is in contrast to the Office of Civil Rights investigation, which does not require the involvement of special education experts.

If it is determined that a school has failed to meet its obligations to a disabled student, the IDEA permits wide ranging remedies. This Court has found that the statutory scheme allows such relief as is "appropriate" for violations. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370 (1985). This Court also determined that the IDEA requires the exercise of "broad discretion" to order an appropriate remedy. *Id.* at 369. As a result, Courts have approved and ordered wide ranging remedies for denials of FAPE under the IDEA. Such IDEA remedies have included: (1) tuition reimbursement to attend a different school; (2) compensatory education; (3) prospective revisions of the IEP; (4) prospective placement; (5) evaluations; and (6) travel expenses to a new school. This Court has also affirmed a due process hearing officer's order requiring a school to provide compensatory services to one of its *former* students. *Id.*

II. The IDEA Requires Petitioners To Exhaust Administrative Remedies If The Relief Sought Can Be Redressed By Any Degree, Even If The Petitioners Are Only Seeking Monetary Damages.

Petitioners' claim relates to whether E.F. was required to exhaust the administrative procedures in §1415(f)-(g) before filing suit in federal court. In 1986, Congress addressed the IDEA's exhaustion requirement by amending 20 U.S.C. §1415(l). The Amendment was in response to the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* found that the IDEA was "the exclusive avenue through which" claims related to special education could be asserted.

When Congress enacted §1415(l), its intent was to confirm that the IDEA did not preempt all claims involving disabled children. Under the Amendment, aggrieved families could still maintain claims under "other Federal laws protecting the rights of children with disabilities." But contrary to Petitioner's claim, Congress did **not** propose to eliminate the IDEA exhaustion requirement when families bring suit under a different legal theory.

To the contrary, when drafting §1415(l), Congress reaffirmed the importance of the exhaustion requirement. Congress clarified that it still intended for families to exhaust IDEA administrative procedures before filing suit on behalf of a disabled child if the claim was educational in nature, no matter the legal

theory. This intent is confirmed in the House Committee notes to the Amendment, which state: "a parent is required to exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985).

Ultimately, while §1415(l) permits other federal claims, the Amendment requires families to exhaust IDEA administrative remedies before filing suit under other laws if they could also obtain relief under the IDEA:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA] . . . , [§504] . . . , or other Federal laws protecting the rights of children with disabilities, **except before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]**, the [administrative appeal] procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

Thus, if the IDEA can provide relief regarding a disabled student's claim, the student must use the IDEA's administrative procedures first, even if the student invokes a different statute.

Section 1415(l) does not absolve school districts of civil liability for injuries which could not be remedied or palliated by IDEA's related services. Instead, it codifies a recognition that the education of disabled children is a complex endeavor, calling for much individual attention, and that a misjudgment in a child's IEP – or a mistake in execution of that plan – can result in unexpected academic and psychological injuries. For that reason, in cases where both the genesis and the manifestations of the problem are educational, §1415(l) requires potential plaintiffs first to give school districts the opportunity to correct the effects of their claimed educational mistakes under the IDEA's administrative process, before recasting claims arising from acts or omissions related to educational efforts as violations of constitutional and statutory rights, with compensation sought in money damages.

A. Exhaustion Of Administrative Remedies Serves Important Policy Purposes

Over the years, circuit courts have found that the policies underlying this exhaustion requirement are both sound and important. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). Exhaustion meets Congress' view "that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's

education." *Crocker*, 873 F.2d at 935, citing *Smith v. Robinson*, 468 U.S. at 1012.

Exhaustion also provides an enormous benefit to the Court. *Crocker*, *supra*. The IDEA recognizes that federal courts are generalists with no expertise in special education matters. *Crocker*, 873 F.2d at 935. Therefore, courts are ill-equipped to act as fact-finders in the first instance in matters relating to special education. *Id.* In contrast, the IDEA administrative procedure provides courts with expert fact-finding by a specialist in special education laws and issues. 20 U.S.C. §1415(f)(3)(A); §1415(f)(3)(D). This expert fact-finding provides courts with an enormous benefit. *Crocker*, 873 F.2d at 935. As the First Circuit recognized in *Frazier*, "[t]his [approach] makes sense because the problems attendant to the evaluation and education of those with special needs are highly ramified and demand the best available expertise." 276 F.3d at 61.

IDEA administrative procedures also provide aggrieved students and their families with an enormous benefit, namely an expedited and cheaper manner to resolve injuries arising from educational disputes. Disputes regarding an IEP accommodation could be resolved within 105 days of the initial complaint, with a fully developed factual record. 34 C.F.R. §300.510(b). According to one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings?*

An Exploratory Study, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (Spring 2007).

Far from penalizing disabled students, §1415(l) provides a fast, efficient way to redress such injuries as an alternative to civil litigation, which may drag on for years. So long as plaintiffs exhaust their IDEA remedies, nothing prevents them from subsequently bringing civil claims based upon violations of constitutional or statutory rights. This case perfectly embodies the benefit the IDEA administrative process provides. Had Petitioners filed a due process hearing request early on, the issue regarding the service dog could have been resolved before the start of the 2010/2011 school year. Instead, they chose to file a federal lawsuit that has now languished for six years since the accommodation request.

III. There Is No Conflict Among The Circuits.

The Sixth Circuit found that Petitioners had to exhaust these procedures before filing suit, no matter the relief artfully requested, or the legal theory pursued, because Petitioners' claims are educational in nature. Petitioners claim that the Sixth Circuit's holding is in accord with nearly every circuit to address the exhaustion issue under §1415(l). Petitioners assert, however, that the circuits conflict with an outlier opinion from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011). When comparing the substance of these circuits' opinions with *Payne*, there is no conflict.

A. The Circuits Uniformly Prevent Plaintiffs From Avoiding The IDEA's Exhaustion Requirement Merely By Limiting A Prayer For Relief To Money Damages.

Indeed, the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits agree when exhaustion under §1415(l) is required. These circuits are unanimous that families raising grievances relating to the education of disabled children are required to exhaust their administrative remedies before filing suit in federal court, even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. *See, e.g., J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112 (2d Cir. 2004).

These circuit courts have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002) (holding families "who bring an IDEA-based claim under 42 U.S.C. § 1983, in which they seek ***only*** money damages, must exhaust the administrative process available under the IDEA as a condition precedent to entering a state or federal court."); *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) ("The plaintiff argues there is no point pursuing administrative remedies because the defendant school districts lack

authority to grant the relief requested, namely money damages. Again, if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant. This goes against the very reason that we have the exhaustion requirement, which is '[to prevent] deliberate disregard and circumvention of agency procedures established by Congress.'").

IDEA administrative procedures must be exhausted if some form of relief is available under the IDEA. To determine whether relief is available, these circuit courts have consistently looked to the gravamen of the plaintiff's factual complaints and injuries; not just the careful wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. Some circuits have used different language to describe the test, whether it is "theory of the grievance," "core harm alleged," or "genesis and manifestation of the injury." Regardless of the nomenclature, each circuit requires plaintiffs to pursue IDEA administrative procedures if the substance of the disabled student's claims is educational in nature, no matter the express relief sought. *See, e.g.*, *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015); *Cudjoe v. Indep. Sch. Dist. # 12*, 297 F.3d 1058, 1066 (10th Cir. 2002) ("[T]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed

to any degree by the IDEA's administrative procedures and remedies."); *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 248 (2d Cir. 2008) (requiring exhaustion because under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme"); *Charlie F. v. Board of Educ. of Skokie*, 98 F.3d 989, 993 (7th Cir. 1996) ("Both **the genesis and the manifestations of the problem are educational**; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.").

These circuit courts' holdings are consistent with the Legislative intent behind §1415(l), which required parents to "exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985). Requiring exhaustion when complaints "involve" FAPE confirms the drafter's intention to examine the nature of the claim, not just superficially examining the specific relief requested in the pleadings.

These decisions are also consistent with the plain language of §1415(l). The relevant portion of this statute reads:

> before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [administrative appeal]

> procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

The statute does not require that "*the* relief requested" must also be available, where "the" would refer to a specific form of relief. Nor does the statute require that "*all* relief requested" must also be available under the IDEA. And as the Tenth Circuit acknowledged, "the word 'available' appears in the statute unqualified with other conditions, such as that the relief must be 'immediately' or 'currently' available." *Cudjoe*, 297 F.3d at 1067. The statute only states exhaustion is required when families are "seeking relief that is also available," without any modifiers preceding "relief" or "available." Without the modifiers such as "the" or "all," §1415(l) requires exhaustion if *some form* of relief is also available under the IDEA.

Had Congress intended to limit the exhaustion requirement in the manner Petitioners request, certainly Congress would have added additional language to the statute. The additional language would expressly restrict exhaustion only to circumstances when *all of the relief a plaintiff expressly requests* is also available under the IDEA. Absent such express language, the only reasonable interpretation of §1415(l) is to require families to utilize IDEA administrative procedures if some form of remedy can also be provided by the IDEA, regardless of the type of relief specifically sought. And the only way to

determine whether "some form of relief" is available under the IDEA is by examining the nature of the claim; the "core harms alleged," the "theory of the grievance," the "genesis and manifestation" of the claim.

B. The Ninth Circuit's Decision In *Payne v. Peninsula School District* Also Prohibits Plaintiffs From Avoiding Exhaustion Through Artful Pleading.

The Ninth Circuit's decision in *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011) is no different in substance than the other circuits. *Payne* involved claims of mental and physical abuse of a disabled student caused by being physically restrained in a small closet.[5] This case, by contrast, relates to Petitioners' request made during an IEP conference for their daughter to have a type of

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[5] *Payne* would have been decided in the same manner in circuits interpreting the "core harms alleged" language. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002); *F.H. ex rel. Hall v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014) (no exhaustion required for claim related to "non-educational injury" resulting from alleged abuse and neglect of disabled student while enrolled in district's schools); *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013) (exhaustion not required for physical abuse of disabled student because injury was not educational in nature). Contrary to Petitioners' argument, the "core harms" standard does not require disabled students to exhaust administrative remedies based solely on the coincidental facts that the student is disabled and injured in a school.

"related service" specifically identified in the IDEA to help E.F. develop independence. Record Entry 1, Page ID 6, ¶33; 20 U.S.C. §1400(d)(1)(A); 34 C.F.R. §300.34(7).

Consistent with the other circuits, the Ninth Circuit in *Payne* held that when a plaintiff seeks an IDEA remedy, administrative remedies must be exhausted. This is true even if the plaintiff's lawsuit is pled only as a Constitutional claim. *Payne* held:

> where a plaintiff is seeking to enforce rights that arise as a result of a denial of free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a [free appropriate public education] to provide the basis of the cause of action. . . . Such claims arise under either the IDEA . . . or its substantive standards (if a [Rehabilitation Act] claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is therefore "available under this subchapter." 20 U.S.C. § 1415(l).

Payne, 653 F.3d at 875. *Payne* found that the exhaustion requirement was intended "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students." *Payne*, 653 F.3d at 876.

Relying on the language, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant – what matters is whether the plaintiff *actually* sought relief available under the IDEA,"

Petitioners argue that *Payne*'s approach focuses solely on the express relief requested in the complaint, while ignoring the nature of the injury alleged. Petitioners' interpretation of *Payne* is too narrow.

The *Payne* Court stated, "when determining whether the IDEA requires a plaintiff to exhaust, courts ***should start*** by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it ***is likely*** that § 1415(l) does not require exhaustion in that case." *Id.* at 876 (emphasis added). *Payne* does not end the inquiry with a mere review of the relief requested, as Petitioners have repeatedly suggested. In fact, *Payne* expressly rejected such an interpretation of its holding. *Id.* at 877.

As every circuit to address the issue, *Payne* requires an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued:

> where the claim arises only as a result of a denial of a FAPE, whether under the IDEA or the Rehabilitation Act, exhaustion is clearly required no matter how the claim is pled.

Id. at 880. As an example, *Payne* stated that "a disabled student's claim arising from a school district's implementation of an educational program that resulted in a claimed failure to adequately instruct in reading" must be exhausted using IDEA procedures, even if the disabled student is requesting monetary

damages in his lawsuit that are not available under the IDEA. *Id.* at 879-880. Under such a scenario, "the plaintiff *actually* sought relief available under the IDEA" by factually alleging the student was denied access to reading instruction, regardless of the relief expressly requested. *Id.* at 875. Based on *Payne*'s willingness to also examine the nature of the claims alleged to determine the need for exhaustion, there is no distinction between the circuits.

And consistent with every circuit, *Payne* also finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages as Petitioners have advocated:

> plaintiffs cannot avoid exhaustion through artful pleading. If the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling – relief available under the IDEA – then the IDEA requires exhaustion. . . . In other words, to the extent that a request for money damages functions as a substitute for relief under the IDEA, a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.

Id. at 877. Based on this language, it does not matter under *Payne* what relief the plaintiff actually requested in their complaint. Consistent with every other circuit, claims that are educational in nature must first be exhausted using IDEA administrative procedures. *Id.* at 879-880. Underscoring the fact that

Payne stands in concert with the circuits in this regard, the Sixth Circuit in *Fry* cited to *Payne* in support of its majority holding. *Fry*, 788 F.3d at 631 ("the exhaustion requirement must apply when the cause of action "arise[s] as a result of a denial of a [FAPE]" – that is, when the legal injury alleged is in essence a violation of IDEA standards. *Payne*, 653 F.3d at 875.").

C. This Case Would Not Be Decided Differently Under Petitioners' Reading Of *Payne v. Peninsula School District.*

Payne still requires Petitioners to exhaust in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training" curriculum, and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.39(a), (b)(4)(ii), §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Here, a special IEP meeting was convened for the purpose of determining whether E.F.'s IEP should be amended to include the service animal. Respondents determined during the IEP meeting that those educational needs were already adequately served by her current "'services/programs/accommodations of E.F.'s IEP.'" Record Entry 1, Page ID 6, ¶33. Petitioners claim that the implementation

of this educational program for E.F. absent the dog resulted in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building.

An allegation that a disabled student was denied a related service specifically identified in the IDEA is by definition a claim that the student was denied a FAPE. Petitioners' lawsuit is nearly identical to *Payne*'s example of an injury resulting from the failure to provide a reading accommodation. *Payne* found that such a case must be exhausted, even if the plaintiffs sought money damages not available under the IDEA. *Payne*, 653 F.3d at 879-880.

These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services or for a specific curriculum made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum or "related service" to foster independent living. Had Petitioners requested a due process hearing, the dispute over this accommodation would have likely been resolved before the start of the next school year. If it was resolved in Petitioner's favor, most if not all of the harm alleged would have been avoided. If Respondents had prevailed, Petitioners still could have sought its legal remedies in federal court.

In an effort to avoid exhaustion, Petitioners claim they were "principally" seeking money in their lawsuit, and were not concerned with correcting the

potential educational injury to E.F. p. 18. Relying on an incorrect interpretation of *Payne*, Petitioners claim they were not required to exhaust IDEA administrative procedures because some of the forms of relief they requested are not available under the IDEA. Under *Payne*, that argument does not avoid exhaustion. *Id.* at 877 ("a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.").

Petitioners, in fact, actually sought forms of relief in their Complaint that were available under the IDEA. Petitioners expressly requested "***any***" relief the Court determines appropriate. Record Entry 1 Page ID 16, ¶E. This request compels Petitioners to exhaust under *Payne*, as the Ninth Circuit also stated that exhaustion applies in cases "where the relief sought by the plaintiff in the pleadings is available under the IDEA." 653 F.3d at 871. Petitioners' request necessarily encompasses all available relief under the IDEA. The IDEA would allow a number of potential remedies, including "prospective injunctive relief" should E.F. return to Respondents' schools, ordering Respondents to accept the dog; an order requiring the Schools to pay for compensatory/education services; reimbursement of past expenses, attorney fees and costs; all IDEA remedies. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370, 105 (1985).

D. Relief Is Still Available Under IDEA Although Petitioners Voluntarily Left The School District To Avoid Exhaustion.

Petitioners also claim that relief is not available under the IDEA because E.F. chose to leave Napoleon Community Schools. The Supreme Court, however, has established that IDEA relief is still available to E.F., even though she now attends a different school. *See Sch. Comm. of Town of Burlington*, 471 U.S. at 369-370.

In *Burlington*, the respondent father of a handicapped child rejected the petitioner school's proposed IEP calling for placement of the child in a certain public school. 471 U.S. at 362. The father disagreed with the IEP and, at his own expense, enrolled the child in a private school. Meanwhile, the father sought review by Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). 471 U.S. at 362-363. After conducting multiple impartial due process hearings, BSEA ordered the school to pay the child's tuition and transportation to his new school. The *Burlington* Court determined whether these "belated" reimbursement costs were available remedies under the IDEA.

This Court affirmed the BSEA's order, and held that the respondent father was entitled to reimbursement of expenses, such as private school tuition and transportation costs, as a remedy under the IDEA. This IDEA remedy was available even though

his son no longer attended the respondent's school. The *Burlington* Court recognized that the EHCA – now IDEA – allows "such relief as [it] determines is appropriate," which requires the exercise of "broad discretion" to order an appropriate remedy. 471 U.S. at 369. With that guidepost, and germane to Petitioners' argument here, the Court held that appropriate remedies under the IDEA include the "belated" reimbursement of expenses after the student has already left the school district. *Id.* at 370-371. This Court reasoned that "[s]uch a *post hoc* determination of financial responsibility was contemplated in the legislative history" of the IDEA. *Id.* at 371.

Indeed, students may receive a wide range of remedies under the IDEA from a school the student formerly attended. This Court has found that common remedies that can be "belatedly" ordered include awards of compensatory education and services, reimbursement of costs, and attorney fees. *Burlington*, 471 U.S. at 369-370; *see also Long v. Dawson Springs Ind. Sch. Distr.*, 197 Fed. Appx. 427 (6th Cir. 2006) (holding that "[i]t is clear that the IDEA authorizes the award of funds to parents to reimburse them for expenses on special education that a school board should have, but did not, provide."). Directly related to Petitioners' claim, as a remedy available under the IDEA, Respondents could also be required to pay for E.F. to attend a different school district. *Id.* Such a remedy has included payment of tuition and travel costs. *Id.*

If Petitioners paid costs and attorney's fees for the two-and-a-half years from the time the accommodation was requested and E.F. moved schools, Petitioners could still recover those costs and fees. Since Respondent Jackson Intermediate School District remains E.F.'s home school district, conceivably Petitioners could seek the travel costs to attend a different school under the IDEA. In sum, Petitioners may still seek multiple "appropriate" remedies under the IDEA even though E.F. attends a different school.

Moreover, circuits addressing Petitioner's argument have unanimously held that a plaintiff cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. *Fry*, 788 F.3d at 630; *see also Frazier*, 276 F.3d at 63; *Polera v. Board of Ed. of Newburgh*, 288 F.3d 478, 490 (2d Cir. 2002) ("Plaintiffs should not be permitted to 'sit on' live claims and spurn the administrative process that could provide the educational services they seek, then later sue for damages. Were we to condone such conduct, we would frustrate the IDEA's carefully crafted process for the prompt resolution of grievances through interaction between parents of [children with disabilities] and the agencies responsible for educating those children."); *Cudjoe*, 297 F.3d at 1067 ("[W]e reject the argument that exhaustion will be excused because relief is no longer 'available' at the time the plaintiff seeks to file a civil suit if relief was available at the time the alleged injuries occurred. To hold otherwise would transform the IDEA's exhaustion requirement into a

'hollow gesture.'"); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d at 1379 ("[P]laintiff argues that exhaustion of administrative remedies is not required in this case because she no longer attends any of the defendant school districts. . . . If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory. Permitting parents to avoid the requirements of the IDEA through such a 'back door' would not be consistent with the legislative intent of the IDEA."). Similarly, Petitioners' decision to leave Respondents' schools does not make IDEA remedies unavailable. IDEA relief was available to Petitioners for the entire two and a half years that E.F. attended Respondents' schools while the dispute persisted. Petitioners simply chose not to pursue such relief.

IV. This Case Does Not Warrant Review.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, claiming that the Ninth Circuit's decision marked a departure from every circuit that decided the issue, thereby by creating a circuit split. This Court presumably was not convinced that *Payne* created a circuit split, or that a significant enough legal issue was presented, and the Petition was denied.

Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the gravamen of the plaintiffs' claim to determine whether exhaustion was required, as required by the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits – and the Ninth Circuit's decision in *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no Circuit Court cases have relied on *Payne* in the manner Petitioner interprets this decision. This confirms that Petitioner's interpretation of *Payne* makes it an outlier, and not a legal trend dividing the circuits.

Any alleged conflict *Payne* causes is likely to be resolved by the Ninth Circuit. In 2014, the Ninth Circuit acknowledged that fundamentally important portions of the *Payne* decision were improperly decided, overruling the case in substantial part. *See Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 403 (2014). Part of the *Payne* opinion included a ruling by the Ninth Circuit that IDEA exhaustion under §1415(l) was not jurisdictional. Like the so-called "relief centered" approach, the *Payne* decision appeared to be the only Circuit Court decision to hold that IDEA exhaustion was not jurisdictional. *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013). In 2014, the Ninth

Circuit found that it had wrongly decided *Payne*, and overruled that portion of the decision. *See Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). It is only a matter of time before the Ninth Circuit corrects this interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MULLINS
Counsel of Record
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
kchapie@gmhlaw.com

Counsel for Respondents

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EHLENA FRY, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiff,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

Case No. _____

COMPLAINT AND JURY DEMAND

COMPLAINT AND JURY DEMAND

(Filed Dec. 17, 2012)

INTRODUCTION

1. This disability rights case is filed by a young girl with cerebral palsy against her former school district and intermediate school district for refusing to allow her to bring a trained service dog with her to school to assist her with mobility and balance problems and increase her independence.

2. Plaintiff Ehlena Fry is an eight-year-old girl who was born with spastic quadriplegic cerebral palsy, the most severe form of cerebral palsy. Spastic quadriplegic cerebral palsy affects Ehlena's legs,

arms, and body and significantly limits her motor skills and mobility. She is not impaired cognitively, but needs physical assistance in her daily activities.

3. In 2009, when Ehlena was five years old, Ehlena's parents, with the generous help of families at Ehlena's elementary school and throughout the community, obtained a service dog prescribed by their pediatrician to help her to live as independently as possible. Together the family and the dog, a Goldendoodle named "Wonder," trained at a facility in Ohio for service animals and their handlers. Wonder was certified and trained to help Ehlena with mobility and to assist her in daily activities, including retrieving dropped items, opening and closing doors, turning on and off lights, taking her coat off, using the bathroom, and helping bridge social barriers.

4. It was the pediatrician's and the family's intention for Wonder to accompany Ehlena at all times to facilitate her independence and to ensure that Ehlena and Wonder would bond after the training. However, despite knowing of the Frys' plans, Defendants refused to allow Ehlena to attend school with Wonder.

5. As a result, Ehlena was forced to attend school without Wonder from October 2009 to April 2010. After Ehlena's lawyers met with the school district's counsel, Ehlena was allowed to bring Wonder to school for a "trial period" at the end of the school year. However, the administration refused to allow Ehlena to use Wonder as a service dog during

that period; rather, the dog was required to remain in the back of the room during classes, was forbidden from assisting Ehlena with many tasks he had been specifically trained to do, and was forbidden from accompanying and assisting Ehlena during recess, lunch, computer lab, library time and other activities.

6. Following the trial period, the administration refused to modify the school's policies to accommodate Ehlena's disabilities as required by law and even refused to recognize Wonder as a service dog. Consequently, Ehlena's parents removed her from school and filed a complaint with the Office of Civil Rights (OCR) at the United States Department of Education. While waiting for an OCR ruling, Ehlena was homeschooled using an online curriculum and she had very limited contact with children her own age.

7. Two years later, in May 2012, OCR issued a disposition letter finding that Ehlena's school district, Defendant Napoleon Community Schools, and Defendant Jackson Intermediate School District had violated Ehlena's rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and the regulations implementing these civil right [sic] laws.

8. In order to settle the complaint with OCR, the school district agreed to take Ehlena back with Wonder, but the district refused to accept the factual findings or legal conclusions of OCR. After Ehlena's father, Brent Fry, spoke with Pamela Barnes, the principal, to discuss Ehlena returning to school with

Wonder, the parents had serious concerns that the administration would resent Ehlena and make her return to school difficult. Accordingly, they found a public school in Washtenaw County where the staff welcomed Ehlena and Wonder and saw their presence as an opportunity to promote inclusion of students with disabilities within the school. Ehlena now attends the school in Washtenaw County.

9. Ehlena, through her parents, brings this action against the Napoleon Community Schools and Jackson Intermediate School District, and Pamela Barnes, pursuant to the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Michigan Persons with Disabilities Civil Rights Act. She seeks a declaration that her rights were violated and damages for the injuries she suffered as a result of the denial of her civil rights.

JURIDICTION [sic] **AND VENUE**

10. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343 because this is a civil action seeking redress for the deprivation of rights secured by federal law – specifically Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 794(a), and 42 U.S.C. § 1983. Jurisdiction over the supplemental state-law claim is proper under 28 U.S.C. § 1367.

11. Venue is proper in that the complained of actions took place in, and the parties reside in, Jackson County, which is in the Eastern District of Michigan.

PARTIES

12. Plaintiff Ehlena Fry is a minor who resides in Jackson County, within the Eastern District of Michigan. She brings this action through her parents and next friends, Stacy and Brent Fry, who also reside in Jackson County.

13. Defendant Napoleon Community Schools (the "District") is a public school district and a body corporate organized under the laws of Michigan, located in Jackson County.

14. Defendant Jackson County Intermediate School District ("ISD") is a public intermediate school district organized under the laws of Michigan, located in Jackson County.

15. Pamela Barnes is the principal of Ezra Eby Elementary School.

16. During the 2009-2010 school year, Plaintiff attended Ezra Eby Elementary School, which is part of the Defendant Napoleon Community Schools and Defendant Jackson Intermediate School District.

FACTUAL ALLEGATIONS

17. Plaintiff incorporates the preceding paragraphs.

18. Ehlena was born in 2004 and is now eight years old.

19. Ehlena was born with spastic quadriplegic cerebral palsy, which is the most severe form of cerebral palsy. Spastic quadriplegic cerebral palsy affects Ehlena's legs, arms, and body and significantly limits her motor skills and mobility.

20. Ehlena is not cognitively impaired, but she also has been diagnosed with ADHD inattentive type and seizure disorder.

21. Ehlena is a person with a disability as that term is defined by Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Michigan Persons with Disabilities Civil Rights Act.

22. On or about May 2008, Ehlena's pediatrician wrote a prescription for a service dog to assist her in her everyday activities.

23. Before enrolling her in the Ezra Eby Elementary School kindergarten program for the 2009-2010 school year, Ehlena's parents informed the school administration that they planned to obtain a service dog for Ehlena to assist her in her everyday activities. Defendants led Ehlena's parents to believe that the service dog could attend school with Ehlena.

24. During the 2008-2009 school year, the surrounding communities sponsored a successful fundraisers [sic] to raise a portion of the approximately

$13,000 to help Ehlena's family pay for the training of a service dog, "Wonder."

25. Wonder is a Goldendoodle, a cross between a Golden Retriever and a Poodle. Goldendoodles are known for being intelligent, affectionate, human-oriented dogs. Because Goldendoodles have a no-shedding or low-shedding coat, they are generally tolerable to people with allergies to dogs.

26. In the fall of 2009, Ehlena and her family trained with Wonder at the service animal training facility "4 Paws for Ability" in Ohio, a non-profit agency specializing in placing service dogs.

27. Wonder is a specially trained and certified service dog and assists Ehlena in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, helping her transfer to and from the toilet.

28. Wonder enables Ehlena to develop independence and confidence and helps her to bridge social barriers.

29. While Ehlena must have a handler assist her with Wonder while she is young, she will be able to handle Wonder on her own when she is older and stronger.

30. In October 2009, Wonder received his certification and returned to Michigan with Ehlena and her family.

31. However, much to the Frys' surprise and disappointment, Defendants told them that Ehlena could not bring Wonder to school.

32. Jackson County Intermediate School District Director Richard Rendell and Pamela Barnes formalized the decision to reject the request to bring Wonder to school in a specially convened Individualized Education Plan ("IEP") meeting on January 7, 2010.

33. The IEP states that Ehlena's parents "requested a service dog for their daughter to enhance her independence" and that the request was denied as Ehlena's "physical and academic needs are being met through the services/programs/accommodations of the IEP."

34. The Frys, through pro bono counsel, negotiated an agreement with Defendants under which Ehlena was allowed to bring Wonder to school for a 30-day "trial period" that began on April 12, 2010 and was extended through the end of the school year.

35. However, Defendants refused to allow Ehlena to use Wonder as a service dog during the trial period; rather, the dog was required to remain in the back of the room during classes, and was forbidden from assisting Ehlena with many tasks he had been specifically trained to do.

36. Defendants also refused to allow Wonder to accompany and assist Ehlena during recess, lunch, computer lab and library.

37. Defendants further prohibited Ehlena from participating in other activities with Wonder such as walking the track during "Relay for Life," a school play and "field day."

38. Following the trial period, Defendants refused to modify the school's policies to accommodate Ehlena's disabilities for the next school year as required by law.

39. Defendants refused to extend the areas where Wonder would be allowed to assist Ehlena and refused to allow Wonder to perform all the tasks for which he had been trained.

40. Defendants even refused to recognize Wonder as a service dog.

41. As a result, Ehlena's parents removed Ehlena from Ezra Eby Elementary School and filed a complaint with the Office of Civil Rights (OCR) at the United States Department of Education.

42. While waiting for an OCR ruling, Ehlena was homeschooled using an online curriculum for two years.

43. In addition to her duties raising Ehlena and her siblings, Stacy Fry took on the added educational responsibilities to ensure that Ehlena was receiving the appropriate curriculum.

44. Stacy Fry's role as Ehlena's teach [sic] was particularly challenging and frustrating because she

did not have specific training in teaching methods that Ehlena required.

45. Ehlena had very limited contact with children her own age while she was being homeschooled.

46. Two years later, in May 2012, OCR issued a 14-page disposition letter to the school finding that Ehlena's school district and intermediate school district had violated Ehlena's rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and the federal regulations implementing the laws. (See 5/3/12 Disposition Letter and Resolution Agreement, attached as Exhibit A)

47. In order to settle the complaint with OCR, the school district entered into a six-page resolution agreement in which it agreed to take Ehlena back with Wonder and allow Wonder to accompany and assist Ehlena throughout the school. However, the district refused to accept the factual findings or legal conclusions of OCR. (*See* Exhibit A)

48. After Brent Fry spoke with the [sic] Pamela Barnes in the summer of 2012 to discuss Ehlena returning to school with Wonder in the fall, Ehlena's parents had serious concerns that the administration would resent Ehlena and make her return to school difficult.

49. Accordingly, they found a public school in Washtenaw County, where the principal and staff enthusiastically welcomed Ehlena and Wonder and saw their presence as an opportunity to promote

inclusion of students with disabilities within the school.

50. Ehlena now attends a Washtenaw County school and is again able to interact with children her own age.

51. Defendants' refusal to accommodate Ehlena's disabilities has caused her harm, including, but not limited to:

a. denial of equal access to Defendants' facilities, programs, and services;

b. denial of the use of Wonder as a service dog at school from October 2009 to June 2010;

c. interference with Ehlena's ability to form a bond with Wonder from October 2009 to June 2010, which compromised Wonder's ability to effectively assist Ehlena outside of school;

d. denial of the opportunity to interact with other students at Ezra Eby Elementary School during the 2010-2011 and 2011-2012 school years when she was homeschooled due to the refusal of Defendants to use Wonder as a service dog at school;

e. loss of ability to interact with students at Ezra Eby Elementary School and stress caused by leaving the Napoleon Community Schools and enrolling in a new school in a different county for the 2012-2013 academic year; and

f. emotional distress and pain, embarrassment, mental anguish, inconvenience, and loss of enjoyment

of life resulting from Defendants' refusal to reasonably accommodate her as a person with a disability who uses a service animal.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS AND JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT SECTION 504 OF THE REHABILITATION ACT OF 1973

52. Plaintiff incorporates the preceding paragraphs.

53. Section 504 of the Rehabilitation Act of 1973 ("Section 504") and its implementing regulations provide, "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4(a).

54. Among other requirements, entities subject to Section 504 must provide equal opportunity to qualified persons with disabilities to participate or benefit from any aid, benefit, or service they make available. 34 C.F.R. § 104.4(b)(1)(ii).

55. Entities subject to Section 504 must avoid otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege,

advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. § 104.4(b)(1)(vii).

56. An "individual with a disability" is defined by reference to the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 705(20)(B); referencing 42 U.S.C. § 12102(1). A person has a disability under Section 504 if they have a physical or mental impairment that substantially limits one or more of their major life activities. 42 U.S.C. § 12102(1).

57. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, standing, lifting, bending, speaking, learning, and working. 42 U.S.C. § 12102(2)(A). Major life activities also include the operations of major bodily function. 42 U.S.C. § 12102(2)(B).

58. A "qualified individual with a disability" is one who, with or without reasonable accommodations for their disability, meets essential eligibility requirements to receive services from or participate in the programs or activities of a recipient of Federal financial assistance. *See* 29 U.S.C. § 794(a).

59. A "program or activity" includes local education agencies, public boards of education, and school systems. 29 U.S.C. § 794(b)(2)(B), referencing 20 U.S.C. § 7801(26). A "recipient of federal financial assistance" is a public or private agency or other entity to which Federal financial assistance is extended directly or through another recipient. 34 C.F.R. § 104.3(f).

60. Ehlena is an individual having physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she also has been diagnosed with ADHD inattentive type and seizure disorder.

61. Ehlena's impairments affect her major life activities of caring for herself, and performing manual tasks. *See* 42 U.S.C. § 12102(2).

62. Ehlena is an individual with disabilities as defined by Section 504. 29 U.S.C. § 705(20)(B); referencing 42 U.S.C. § 12102(1).

63. Ehlena is an otherwise qualified individual with disabilities who meets essential eligibility requirements to receive services from or participate in the programs or activities of the District and ISD. *See* 42 U.S.C. § 12131(2); 29 U.S.C. § 794(a).

64. Ehlena attended and received educational services from the District and ISD.

65. The District and ISD are a "program[s] or activit[ies]" subject to Section 504. *See* 29 U.S.C. § 794(b)(2)(B), referencing 20 U.S.C. § 7801(26).

66. The District and ISD are recipients of federal financial assistance as they receive federal funds.

67. The District and ISD are entities subject to the non-discrimination requirements of Section 504. *See* 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4.

68. The District's and ISD's refusal to allow Wonder to act as a service dog for Ehlena and to permit his access in the instructional setting discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers. *See* 34 C.F.R. §§ 104.4(a), 104.4(b)(ii) and (iv).

69. The District's and ISD's refusal to recognize Wonder as a service dog and to permit his access in the instructional setting was illegal disability-based discrimination that violated Section 504 of the Rehabilitation Act of 1973.

70. The District's and ISD's discrimination was intentional as the District's and ISD's knowingly refused to recognize Wonder as a service dog despite having full knowledge that Ehlena qualified as an individual with disabilities and relied upon Wonder to obtain equal access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers.

71. As a proximate cause of these violations of Section 504, Ehlena has suffered harm as set forth above.

SECOND CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS AND JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT TITLE II OF THE AMERICANS WITH DISABILITIES ACT

72. Plaintiff incorporates all prior allegations.

73. Title II of the ADA and its implementing regulations forbid public entities, including local educational agencies, to exclude or deny people with disabilities the benefits of its services, programs, or activities, or to discriminate based on disability. 42 U.S.C. § 12132; 28 C.F.R. §§ 35.104 & .130(a).

74. Prohibited disability-based discrimination by public entities includes the failure to provide qualified individuals with disabilities an equal opportunity to participate in or benefit from aids, benefits, or services or "otherwise limit" a qualified individual with a disability in the enjoyment of any right, privilege, aid, benefit, or service. 28 C.F.R. § 35.130(b)(1)(ii) & (vii). Prohibited discrimination additionally includes the failure to make reasonable modifications as necessary to avoid discrimination against an individual based on their disability. 28 C.F.R. § 35.130(b)(7).

75. An "individual with a disability" is one who has a physical or mental impairment that substantially limits one or more of their major life activities. 42 U.S.C. § 12102(1).

76. Major life activities include, but are not limited to, caring for oneself, performing manual

tasks, walking, standing, lifting, bending, speaking, learning, and working. 42 U.S.C. § 12102(2)(A). Major life activities also include the operations of major bodily function. 42 U.S.C. § 12102(2)(B).

77. A "qualified individual with a disability" is one who, with or without reasonable accommodations for her disability, meets essential eligibility requirements to receive services from or participate in the programs or activities of the public entity. 42 U.S.C. § 12131(2).

78. Ehlena is an individual having physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she has been diagnosed with ADHD inattentive type and seizure disorder.

79. Ehlena's impairments affect her major life activities including caring for herself, walking, balancing, and performing manual tasks. See 42 U.S.C. § 12102(2)(A).

80. Ehlena is an otherwise qualified individual with disabilities who meets the essential eligibility requirements to receive services from or participate in the programs or activities of the District and ISD. *See* 42 U.S.C. § 12131(2).

81. The District and ISD are public entities forbidden to discriminate based on disability. *See* 42 U.S.C. § 12132.

82. The District's and ISD's deliberate refusal to recognize Wonder as a service dog and to permit his

access in the instructional setting, discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers. *See* 28 C.F.R. §§ 35.130(a), .130(b)(1)(ii) & (vii).

83. The District and ISD illegally discriminated against Ehlena in their continuing refusal to reasonably accommodate Ehlena as a person with disabilities who uses a service animal. *See* 28 C.F.R. § 35.130(b)(7).

84. The ADA defines a service animal as:

> . . . any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

See 28 C.F.R. § 36.104.

85. The ADA further requires public entities to modify their "policies, practices, or procedures to permit the use of a service animal by an individual with a disability." *See* 28 C.F.R. § 36.302(c).

86. Wonder is a dog that was individually trained to perform tasks for Ehlena's benefit. The tasks that

Wonder has been trained to perform are uniquely suited to Ehlena's needs as a person with a disability.

87. The District's and ISD's refusal to grant Ehlena's requested accommodations was illegal disability-based discrimination that violates Title II of the Americans with Disabilities Act of 1990.

88. The District's and ISD's discrimination was intentional as the District and ISD knowingly refused to accommodate Ehlena despite having full knowledge that she is a qualified individual with disabilities and that she relied upon Wonder as a service dog under the ADA to obtain equal access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers.

89. As a proximate cause of these violations of Title II of the Americans with Disabilities Act, Ehlena has suffered harm as set forth above.

THIRD CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

90. Plaintiff incorporates all prior allegations.

91. The Michigan Persons with Disabilities Civil Rights Act (the "Michigan Act") prohibits educational institutions to exclude or deny people with

disabilities the full benefits of their programs, activities, and facilities or to discriminate based on disability. M.C.L. § 37.1101 *et seq.*

92. The District and ISD are educational institutions as the term is defined in M.C.L. § 37.1401.

93. Barnes is an agent of an educational system as the term is defined in M.C.L. § 37.1401.

94. Ehlena is a person with a disability as that term is defined in the Michigan Act because she has physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she also has been diagnosed with ADHD inattentive type and seizure disorder.

95. Ehlena's disabilities substantially limit one or more of her life activities and is unrelated to her ability to use and benefit from Defendants' educational activities, programs, and facilities.

96. Despite her disabilities, Ehlena is otherwise qualified to use and benefit from the District's and ISD's educational activities, programs, and facilities.

97. Defendants' refusal to recognize Wonder as a service dog and to permit his access in the instructional setting, discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to Defendants' facilities, programs, and services as compared to her non-disabled, non-service animal user peers. M.C.L. § 37.1402.

98. As a proximate cause of these violations of the Michigan Persons with Disabilities Act, Ehlena has suffered harm as set forth above.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

a. Enter judgment in her favor against Defendants;

b. Issue a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act;

c. Award her damages in an amount to be determined at trial;

d. Award attorneys' fees pursuant to the Rehabilitation Act, the Americans with Disabilities Act, 42 U.S.C. § 1988 and the Michigan Persons with Disabilities Civil Rights Act; and

e. Grant any other relief this Court deems appropriate.

JURY DEMAND

Plaintiff respectfully requests a jury trial on all issues triable to a jury.

Respectfully submitted,

/s/ Peter M. Kellett
Peter M. Kellett (P34345)
James F. Hermon (P53765)
Brandon M. Blazo (P71172)
Dykema Gossett PLLC
Cooperating Attorneys, American Fund of Michigan
400 Renaissance Center
Detroit, MI 48243
Telephone: (313) 568-6800
Pkellett@dykema.com
jhermon@dykema.com
bblazo@dykema.com

/s/Denise M. Heberle
Denise M. Heberle (P64145)
Heberle & Finnegan
Cooperating Attorneys, ACLU Fund of Michigan
2580 Craig Road
Ann Arbor, MI 48103
Telephone: (734) 302-3233
dmheberle@gmail.com

/s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
Kary L. Moss (49759)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
Telephone: (313) 578-6814
msteinberg@aclumich.org
kmoss@aclumich.org

/s/Gayle C. Rosen
Gayle C. Rosen (P46874)
Cooperating Attorney, ACLU Fund of Michigan
715 N. University Ave., Suite 202
Ann Arbor, MI 48104
Telephone: (734) 763-9920
gaylrose[sic]@umich.edu

Attorneys for Plaintiffs

Dated: December 17, 2012

[Exhibit Omitted]

RELEVANT STATUTES AND REGULATIONS

20 U.S.C. § 1400. Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities,

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities,

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of assessment of, and provision of services for,

our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population,

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease,

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes

The purposes of this chapter are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

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20 U.S.C. § 1401. Definitions

Except as otherwise provided, in this chapter:

(1) Assistive technology device

(A) In general

The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(2) Assistive technology service

The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes –

(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers,

or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

(3) Child with a disability

(A) In general

The term "child with a disability" means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child –

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development;

cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

(4) Core academic subjects

The term "core academic subjects" has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801].

(5) Educational service agency

The term "educational service agency" –

(A) means a regional public multiservice agency –

(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and

(B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

(6) Elementary school

The term "elementary school" means a nonprofit institutional day or residential school, including

a public elementary charter school, that provides elementary education, as determined under State law.

(7) Equipment

The term "equipment" includes –

(A) machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house such machinery, utilities, or equipment; and

(B) all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published, and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(8) Excess costs

The term "excess costs" means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary school or secondary school student, as may be appropriate, and which shall be computed after deducting –

(A) amounts received –

(i) under subchapter II;

(ii) under part A of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. 6311 et seq.]; and

(iii) under parts A and B of title III of that Act [20 U.S.C.A. § 6811 et seq. and 20 U.S.C.A. § 6891 et seq.]; and

(B) any State or local funds expended for programs that would qualify for assistance under any of those parts.

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(10) Highly qualified

(A) In general

For any special education teacher, the term "highly qualified" has the meaning given the term in section 9101 of the Elementary

and Secondary Education Act of 1965 [20 U.S.C.A. § 7801], except that such term also –

(i) includes the requirements described in subparagraph (B); and

(ii) includes the option for teachers to meet the requirements of section 9101 of such Act by meeting the requirements of subparagraph (C) or (D).

(B) Requirements for special education teachers

When used with respect to any public elementary school or secondary school special education teacher teaching in a State, such term means that –

(i) the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the requirements set forth in the State's public charter school law;

(ii) the teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) the teacher holds at least a bachelor's degree.

(C) Special education teachers teaching to alternate achievement standards

When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under the regulations promulgated under section 1111(b)(1) of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6311(b)(1)], such term means the teacher, whether new or not new to the profession, may either –

(i) meet the applicable requirements of section 9101 of such Act [20 U.S.C.A. § 7801] for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

(ii) meet the requirements of subparagraph (B) or (C) of section 9101(23) of such Act as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.

(D) Special education teachers teaching multiple subjects

When used with respect to a special education teacher who teaches 2 or more core

academic subjects exclusively to children with disabilities, such term means that the teacher may either –

> (i) meet the applicable requirements of section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801] for any elementary, middle, or secondary school teacher who is new or not new to the profession;
>
> (ii) in the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or
>
> (iii) in the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering

multiple subjects, not later than 2 years after the date of employment

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this section or subchapter shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

(F) Definition for purposes of the ESEA

A teacher who is highly qualified under this paragraph shall be considered highly qualified for purposes of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.].

(11) Homeless children

The term "homeless children" has the meaning given the term "homeless children and youths" in section 11434a of Title 42.

(12) Indian

The term "Indian" means an individual who is a member of an Indian tribe.

(13) Indian tribe

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native

village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

(14) Individualized education program; IEP

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

(15) Individualized family service plan

The term "individualized family service plan" has the meaning given the term in section 1436 of this title.

(16) Infant or toddler with a disability

The term "infant or toddler with a disability" has the meaning given the term in section 1432 of this title.

(17) Institution of higher education

The term "institution of higher education" –

(A) has the meaning given the term in section 1001 of this title; and

(B) also includes any community college receiving funding from the Secretary of the Interior under the Tribally Controlled Colleges and Universities Assistance Act of 1978,

(18) Limited English proficient

The term "limited English proficient" has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801].

(19) Local educational agency

(A) In general

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(B) Educational service agencies and other public institutions or agencies

The term includes –

(i) an educational service agency; and

(ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(C) BIA funded schools

The term includes an elementary school or secondary school funded by the Bureau of

Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs,

(20) Native language

The term "native language", when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

(21) Nonprofit

The term "nonprofit", as applied to a school, agency, organization, or institution, means a school, agency, organization, or institution owned and operated by 1 or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(22) Outlying area

The term "outlying area" means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(23) Parent

The term "parent" means –

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

(24) Parent organization

The term "parent organization" has the meaning given the term in section 1471(g) of this title,

(25) Parent training and information center

The term "parent training and information center" means a center assisted under section 1471 or 1472 of this title,

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective,

and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children,

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(27) Secondary school

The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(28) Secretary

The term "Secretary" means the Secretary of Education.

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(30) Specific learning disability

(A) In general

The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of

environmental, cultural, or economic disadvantage.

(D) State

The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(32) State educational agency

The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(33) Supplementary aids and services

The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title.

(34) Transition services

The term "transition services" means a coordinated set of activities for a child with a disability that –

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement

of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(35) Universal design

The term "universal design" has the meaning given the term in section 3002 of Title 29.

(36) Ward of the State

(A) In general

The term "ward of the State" means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.

(B) Exception

The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23).

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34 C.F.R. § 300.34 Related services.

(a) General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

(b) Exception; services that apply to children with surgically implanted devices, including cochlear implants.

(1) Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (b)(1) of this section –

(i) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in paragraph (a) of this section) that are determined by the IEP

Team to be necessary for the child to receive FAPE,

(ii) Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(iii) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in § 300.113(b).

(c) Individual related services terms defined. The terms used in this definition are defined as follows:

(1) Audiology includes –

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) Early identification and assessment of disabilities in children means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) Interpreting services includes –

(i) The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C – Print, and TypeWell; and

(ii) Special interpreting services for children who are deaf-blind.

(5) Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(6) Occupational therapy –

(i) Means services provided by a qualified occupational therapist; and

(ii) Includes –

(A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(7) Orientation and mobility services –

(i) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching children the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8)(i) Parent counseling and training means assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(9) Physical therapy means services provided by a qualified physical therapist.

(10) Psychological services includes-

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(11) Recreation includes –

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(12) Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

(13) School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

(14) Social work services in schools includes –

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(15) Speech-language pathology services includes –

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(16) Transportation includes –

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

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34 C.F.R. § 300.39 Special education.

(a) General.

(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including –

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section –

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) Individual special education terms defined. The terms in this definition are defined as follows:

(1) At no cost means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) Physical education means –

(i) The development of –

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – –

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) Travel training means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with

disabilities who require this instruction, to enable them to –

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

---

34 C.F.R. § 300.43 Transition services.

(a) Transition services means a coordinated set of activities for a child with a disability that –

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

RECORD AND BRIEFS

No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Respondents say that the Handicapped Children's Protection Act ("HCPA") bars disabled children and their parents from proceeding immediately to court on an Americans with Disabilities Act or Rehabilitation Act claim "if some form of remedy can also be provided by the IDEA, regardless of the type of relief specifically sought" (Brief In Opposition ("BIO"), p. 23; accord *id.* at 1, 6, 16, 21)—or, more broadly, "where both the genesis and the manifestations of the problem are educational" (*id.* at 17). That is not the rule the HCPA adopts.

The statute adopts a straightforward rule: Plaintiffs must exhaust IDEA remedies before filing a lawsuit under another federal statute only if their lawsuit is one "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). As the Ninth Circuit explained, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (*en banc*) (Bybee, J.), cert. denied, 132 S. Ct. 1540 (2012) (emphasis in original).

Respondents acknowledge that the Sixth Circuit, along with six other circuits, requires exhaustion if IDEA proceedings could provide any form of relief to the plaintiffs—even if it is not the relief the plaintiffs are "seeking" in their suit. (BIO 20-24). Contrary to Respondents' assertions, the Ninth Circuit's decision in *Payne* expressly disagreed with that interpretation. And the Ninth Circuit would not have dismissed this case for failure to exhaust.

There is an entrenched split in the circuits, that split determined the outcome, and the Sixth Circuit

interpreted the statute in conflict with its plain text. This Court should grant *certiorari*.

A. There is a Persistent Conflict in the Circuits

Respondents assert that the rule adopted by the Ninth Circuit "is no different in substance than [that adopted by] the other circuits." (BIO 24) *Payne* decisively refutes that assertion. The Ninth Circuit explained that other circuits had adopted an "injury-centered" approach, under which "the IDEA's exhaustion requirement applied to any case in which a plaintiff alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Payne*, 653 F.3d at 873-874 (emphasis added). *Payne* specifically "reject[ed] th[at] 'injury-centered' approach." *Id.* at 874. Instead, it adopted "a 'relief-centered' approach" under which "what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.* at 874-875 (emphasis in original).

The Ninth Circuit thus recognized that its decision created a conflict. In the post-*Payne* case of *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Central School District*, 496 F. App'x 131, 134 (2d Cir. 2012), the Second Circuit noted the conflict. But the Second Circuit declined to abandon its earlier cases adopting an injury-centered approach, because it considered itself "'bound by the decisions of prior panels until . . . they are overruled either by an en banc panel of our Court or by the Supreme Court.'" *Id.* (quoting *In re Zarnel*, 619 F.3d 156, 168 (2d Cir.2010)).

Contrary to Respondents' assertion (BIO 24 n.5), *Payne* would have come out differently under the rule

adopted by the Sixth Circuit. The plaintiffs sued under 42 U.S.C. § 1983 to challenge a teacher's actions in repeatedly placing the plaintiff child into a locked "time-out room or 'safe room' for students who became 'overly stimulated.'" *Payne*, 653 F.3d at 865. Use of the "safe room" was specifically discussed at the child's Individualized Education Program meeting, see *id.* at 865-866; the parents ultimately responded to the school's actions by removing the child from the district, see *id.* at 866; and plaintiffs "sought damages for the past and ongoing academic and psychological *after-effects* of [the child's] claimed mistreatment," *id.* at 889 (Bea, J., dissenting) (emphasis in original).

In *Payne*, "both the genesis and the manifestations of the problem [were] educational." Cf. BIO 17. Because, as here, the parents removed the child from the school, the district's actions "ultimately denied [him] an education in that school building." Cf. *id.* at 29. And the IDEA could have provided "some form of remedy" (cf. *id.* at 23), in the form of compensatory education and counseling to overcome the academic and psychological effects of the teacher's conduct. Had it applied the Sixth Circuit's rule, *Payne* would thus have affirmed the dismissal of the Section 1983 claim for failure to exhaust.

Respondents suggest that the Ninth Circuit subsequently "overrul[ed] [*Payne*] in substantial part." BIO 35. But the Ninth Circuit has not retreated from *Payne*'s IDEA holding. In *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.) (*en banc*), cert. denied, 135 S. Ct. 403 (2014), the court overturned its earlier practice—applied in *Payne* but also in many other statutory contexts—of allowing defendants to raise

exhaustion through "unenumerated Rule 12(b) motions." Rather, the court held, the proper procedural vehicle for raising exhaustion is a motion for summary judgment. See *id.*[1] *Albino* was a jail conditions case involving the Prison Litigation Reform Act, not an education case involving the IDEA. The *Albino* opinion does not purport to interpret the IDEA or the HCPA. Even after *Albino*, the Ninth Circuit has specifically reaffirmed *Payne*'s holding "that the IDEA's exhaustion provision applies only in cases where *the relief sought* is available under the IDEA." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014) (emphasis added).

B. This Case Directly Implicates the Circuit Conflict

Respondents assert that exhaustion would have been required even under *Payne* (BIO 28-30). That is incorrect. *Payne* "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent"; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student"; and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education." *Payne*, 653 F.3d at 875. None applies here.

None of the relief specifically requested in the complaint is available under the IDEA, nor is it the functional equivalent of an IDEA remedy. See Pet. 18-

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[1] *Nothing in Albino* overrules *Payne*'s holding that the failure to exhaust IDEA remedies is a nonjurisdictional claim-processing rule. See *Payne*, 653 F.3d at 867-871. Cf. BIO 35-36.

20. Petitioners sought damages for the social and emotional harm of denying E.F. the use of her service dog at school. Respondents acknowledge that those damages are not available under the IDEA, because "the IDEA does not allow for an award of general money damages." BIO 6, 20.

Nor did Petitioners seek prospective injunctive relief to alter E.F.'s IEP or her educational placement. Because E.F. no longer attends school in Respondents' district, and her parents have no intention of returning her there, it is doubtful that Petitioners could obtain prospective relief even if sought. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Cf. BIO 30 (stating that "*should E.F. return to Respondents' schools*," Petitioners might be entitled to injunctive relief "ordering Respondents to accept the dog") (emphasis added).

Respondents argue that Petitioners' claim "arises only as a result of a denial of a FAPE." BIO 28 (internal quotation marks omitted). That is wrong. In *some* circumstances, the refusal to permit a child with a disability to use a service animal at school can deny a free appropriate public education. In particular, the IDEA may require schools to permit the use of a service dog as a "related service[]"—but only where that is "required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). Respondents refused to permit E.F. to bring her service animal to school precisely because they did not believe that use of the dog was necessary for her to benefit from her education; they thought the human aide provided in her IEP was sufficient. See Pet. 4; BIO 3.

Petitioners' ADA and Rehabilitation Act claim does not contest that point. The claim is entirely independent of any possible claim of an IDEA violation. Cf. *Payne*, 653 F.3d at 880 (claim that teacher violated Fourth Amendment arises from an independent cause of action and thus is not premised on denial of a FAPE, even though "the alleged excessive punishment took place in a special education classroom" and "might interfere with a student enjoying the fruits of a FAPE"). Even if it was not necessary to enable her to benefit from her education, E.F. had an independent right under the ADA and the Rehabilitation Act to have Wonder accompany her to school—just as she would be entitled to have the dog accompany her to any public facility to which she was invited. See Pet. 5-6.[2] To prevail on their ADA and Rehabilitation Act claim, then, Petitioners would not have been required to establish a denial of a FAPE.

Respondents argue that Petitioners could still obtain compensatory education, reimbursement of the costs of attending a different school, or other IDEA remedies. (BIO 32-33) But whether or not Petitioners *could have* obtained these remedies, they *did not* seek them here. Under *Payne*, that would have been

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[2] Nor would Petitioners have to show that allowing Wonder to attend school with E.F. would have been a necessary form of mobility or "travel training" (BIO 10). E.F.'s claim is not that the exclusion of her dog denied her "instruction . . . to enable [her] to learn the skills necessary to move effectively and safely from place to place." 34 C.F.R. § 300.39(b)(4)(ii). Nor does she claim that Respondents were required to "teach[]" her "to use a service animal." BIO 12 (internal quotation marks omitted). She argues only that Respondents, like anyone else who runs a public facility, were required to allow her to bring her service animal with her.

dispositive. See *Payne*, 653 F.3d at 875 ("whether a plaintiff *could have* sought relief available under the IDEA is irrelevant") (emphasis in original). Respondents note the complaint's boilerplate request for "'***any***' relief the Court determines appropriate"—a request they read as "necessarily encompass[ing] all available relief under the IDEA." BIO 30 (emphasis in the BIO). But it is far from clear that the IDEA remedies Respondents identify would in fact have been available to Petitioners. Petitioners did not claim that the refusal to permit Wonder to accompany E.F. denied her a FAPE—the showing that would be necessary to make tuition reimbursement appropriate. Nor did Petitioners claim that the refusal has caused continuing educational harm—the showing that would be necessary to make compensatory education appropriate.

Payne expressly refused to require exhaustion based on "speculation" about what IDEA remedies children with disabilities might seek. *Payne*, 653 F.3d at 876-877. Had the Sixth Circuit applied *Payne* here, it could not have affirmed the dismissal of Petitioners' suit for failure to exhaust.[3] The circuit conflict thus determined the outcome.

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[3] Even if the Sixth Circuit had concluded that *some* aspects of the relief Petitioners sought required exhaustion, it would not have dismissed the entire lawsuit if it had followed *Payne*. The Ninth Circuit held that a court should "dismiss any claims that are governed by the exhaustion requirement, but it should not dismiss any remaining claims." *Payne*, 653 F.3d at 883. Endorsing standard exhaustion principles, see Pet. 19 n.9, the court refused to adopt "a 'total exhaustion rule.'" *Payne*, 653 F.3d at 883 n.7.

C. The Sixth Circuit's Decision is Wrong

The Sixth Circuit's decision disregards the plain text of the HCPA. See Pet. 18-24. Respondents argue that because "[t]he statute does not require that '*the* relief requested' must also be available," nor "that '*all* relief requested' must also be available under the IDEA," the text is best read as "requir[ing] exhaustion if *some form* of relief is also available under the IDEA." (BIO 23) Respondents fail to account for the key word in the statute—"seeking." The statute requires exhaustion "before the filing of a civil action * * * *seeking relief* that is also available under this subchapter." 20 U.S.C. § 1415(*l*) (emphasis added). The most straightforward reading of this language is that exhaustion is required when the lawsuit actually "seek[s]" relief available under the IDEA—but not when IDEA relief is available but unsought.

Far from giving meaning to the word "seeking," Respondents treat that word as a nullity. See BIO 23 ("[T]he only reasonable interpretation of § 1415(*l*) is to require families to utilize IDEA administrative proceedings if some form of remedy can also be provided by the IDEA, *regardless of the type of relief specifically sought*.") (emphasis added). Respondents disregard three bedrock principles: (1) congressional intent is "[o]f paramount importance to any exhaustion inquiry," *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); (2) "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted); and (3) courts must "give effect, if possible, to every clause and word of a

statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Respondents point to legislative history that, they argue, shows that Congress intended to "require[] parents to 'exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." BIO 22 (quoting H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 7 (1985) (emphasis in BIO)). Even if a committee-report snippet could trump plain statutory text, Respondents rip the quoted statement out of context and thus distort its meaning. The report states that exhaustion is "[t]ypically" required for complaints that involve the enumerated matters, but that "there are certain situations in which it is not appropriate to require the use of [IDEA administrative procedures] before filing a law suit." H.R. Rep. No. 99-296, *supra*, at 7. Among those situations, the report notes, are cases in which "the [IDEA] hearing officer lacks the authority to grant the relief sought." *Id.* The legislative history thus underscores the reading that is apparent from the statute's plain text.

Respondents rely on asserted policy reasons supporting the Sixth Circuit's reading—notably the prospect of quicker relief in the IDEA administrative process (BIO 17-19). But of course policy considerations point in the other direction as well—notably the concern that disabled children and their parents should not be forced to waste their time litigating in tribunals that cannot grant the relief they are requesting. That concern is particularly salient in a case like this one, where IDEA proceedings would require the parties to

focus on an issue—the effect of the refusal to permit a service animal on the child's ability to benefit from education—that need play no role in an ADA or Rehabilitation Act suit.

Considerations like these balance differently in different contexts. Under some statutory schemes, litigants are excused from administrative exhaustion when the agency has no power to grant the relief they seek. See, *e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (Interstate Commerce Act). Under others, litigants must exhaust even in those circumstances. See, *e.g.*, *Booth v. Churner*, 532 U.S. 731 (2001) (Prison Litigation Reform Act). The HCPA's text makes clear that Congress required IDEA exhaustion only when the administrative process can provide the relief the plaintiff is actually "seeking." 20 U.S.C. § 1415(*l*). Congress's decision presumably reflects a determination that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled," *Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982)—and thus that they can be trusted not to bypass administrative processes that stand to benefit their children. That policy judgment was one for Congress to make. See Pet. 20-21. The Sixth Circuit disregarded the determination reflected in the HCPA's text.

Contrary to Respondents' insinuations (BIO 19, 29, 33-34), Petitioners moved quickly to vindicate E.F.'s rights. At the end of the 2009-2010 school year, Respondents announced that E.F. would not be allowed to bring her service dog to school in the fall. Cplt. ¶¶ 38-39. The next month, Petitioners filed a complaint with the Department of Education (USED)

under the ADA and the Rehabilitation Act. *Id.* Exh. A. While that complaint was pending, Petitioners enrolled E.F. in an online virtual academy and taught her at home. *Id.* ¶¶ 41-42. After USED concluded in May 2012 that Respondents had violated the ADA and Rehabilitation Act, E.F.'s father spoke with Respondent Barnes about returning E.F. to Respondents' schools. *Id.* ¶ 48. Based on that discussion, E.F.'s parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." *Id.* They decided to move E.F. to a different school after they "found a public school in Washtenaw County, where the principal and staff enthusiastically welcomed [E.F.] and Wonder." *Id.* ¶ 49.

These are hardly the actions of parents "simply cho[osing] not to pursue . . . relief" (BIO 34), or "singlehandedly rendering the dispute moot" (BIO 33). Had Petitioners simply wanted to file a lawsuit, they would not have filed an administrative complaint with USED—a step that is not a prerequisite to suit under ADA Title II and the Rehabilitation Act. Had Petitioners wished to maximize their monetary recovery, they would have pursued an IDEA claim for reimbursement of educational expenses alongside their other claims. Petitioners forwent IDEA remedies not because they wanted to rush to court, but because IDEA proceedings would focus on whether Wonder was necessary for E.F. to benefit from education (a matter Petitioners do not contest)—not whether Wonder would provide E.F. equal access to a public facility (the salient question under the ADA and Rehabilitation Act). E.F.'s parents wanted to vindicate her broader and independent rights under the ADA and Rehabilitation Act. Congress adopted the HCPA precisely to give

parents that option. See Pet. 3-6. But the Sixth Circuit denied Petitioners what Congress gave them.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

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No. 15-497

In the Supreme Court of the United States

STACY FRY AND BRENT FRY, AS NEXT FRIENDS OF MINOR E.F., PETITIONERS

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
JESSICA WOLLAND
RHONDA WEISS
Attorneys
U.S. Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

Whether petitioners' civil action seeking money damages for past violations of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 constitutes a "civil action * * * seeking relief that is also available under [the Individuals with Disabilities Education Act (IDEA)]" for purposes of the IDEA's exhaustion requirement, 20 U.S.C. 1415(*l*).

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In the Supreme Court of the United States

No. 15-497

STACY FRY AND BRENT FRY, AS NEXT FRIENDS OF MINOR E.F., PETITIONERS

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

This case involves the relationship between litigation under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, on the one hand, and the administrative process set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, on the other. Petitioners sued respondents for money damages, alleging past violations of the ADA and Rehabilitation Act in connection with respondents' refusal to allow their daughter to be accompanied by her trained service dog while attending school. Petitioners' complaint did not invoke the

IDEA's substantive standards or seek relief under that statute's remedial provisions. The district court dismissed the action because petitioners had failed to exhaust the IDEA's administrative process, as required for certain types of claims under 20 U.S.C. 1415(*l*). Pet. App. 50. A divided panel of the court of appeals affirmed. *Id.* at 20.

1. a. The ADA and Rehabilitation Act protect individuals with disabilities from discrimination. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The Department of Justice (DOJ) has promulgated implementing regulations requiring, *inter alia*, that a public entity make "reasonable modifications [to its] policies, practices, or procedures [that are] necessary to avoid discrimination." 28 C.F.R. 35.130(b)(7). As relevant here, the regulations also generally provide that such entities "shall modify [their] policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 C.F.R. 35.136(a). Title II authorizes private citizens to bring suits for money damages to redress violations of its requirements. *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004); see 42 U.S.C. 12133.

The Rehabilitation Act prohibits discrimination on the basis of disability in programs by recipients of federal financial assistance. Section 504 of the Act states that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a); see 28 C.F.R. 41.51(a); 34 C.F.R. 104.4(a). Section 504 served as a model for Title II of the ADA, and the same liability standards generally apply to both statutes. See, *e.g.*, *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1135-1136 (9th Cir. 2001); 42 U.S.C. 12201(a). The Rehabilitation Act authorizes private citizens to bring suits for money damages to redress violations of Section 504. See 29 U.S.C. 794a(a)(2).

b. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). States receiving federal funds must make a "free appropriate public education" (FAPE) available to every child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). As the "centerpiece" of this requirement, school districts must provide each eligible child with an "individualized education program" (IEP). *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). A proper IEP must comply with specific statutory requirements and establish a program of special education and related services that is designed to meet the "unique needs" of the child. *Ibid.*; 20 U.S.C. 1412(a)(4); 34 C.F.R. 300.22, 300.34. The IDEA "contemplates that such education will be provided where possible in regular public schools, * * * but the Act also provides for placement in private schools at public expense where this is not possible." *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985); see 20 U.S.C. 1412(a)(10)(B).

The IDEA requires school districts to work collaboratively with parents to formulate an appropriate IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

Parents who are not satisfied with a proposed IEP, or with other matters relating to the "identification, evaluation, or educational placement of the child, or the provision of a [FAPE]," must first notify the school district of their complaint. 20 U.S.C. 1415(b)(6); see 20 U.S.C. 1415(b)(7). If the dispute cannot be resolved through established procedures, the parents may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A)-(B). The losing party may then seek judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). The court receives the records of the administrative proceedings, and it may hear additional evidence before rendering its decision. 20 U.S.C. 1415(i)(2)(C).

The IDEA empowers courts adjudicating IDEA disputes to "grant such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). This Court and the courts of appeals have generally recognized that the relief available under the IDEA is equitable in nature and encompasses both (1) future spe-

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B), (3)(A)(ii), (3)(D), (4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

cial education and related services that ensure a FAPE or redress past denials of a FAPE, and (2) financial compensation to reimburse parents for past educational expenditures that should have been borne by the State. See, *e.g.*, *Burlington*, 471 U.S. at 369-370; *Sellers* v. *School Bd. of Manassas*, 141 F.3d 524, 527 (4th Cir.), cert. denied, 525 U.S. 871 (1998). But this Court has expressly distinguished such relief from compensatory "damages," *Burlington*, 471 U.S. at 370-371, and the courts of appeals have generally held that such damages are *not* available under the IDEA, see, *e.g.*, *Polera* v. *Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 485-486 (2d Cir. 2002) (citing cases); *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991 (7th Cir. 1996); but see *Salley* v. *St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 466 (5th Cir. 1995) (awarding nominal damages).

c. In *Smith* v. *Robinson*, 468 U.S. 992 (1984), this Court held that the IDEA's predecessor statute was the *exclusive* means of seeking relief for claims alleging the violation of rights to special education specifically guaranteed by that statute. *Id.* at 1012-1013, 1019, 1021. Congress overturned *Smith* by enacting the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796. Section 3 of that statute—now codified at 20 U.S.C. 1415(*l*)—was intended to "reaffirm * * * the viability of [S]ection 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985) (House Report) (explaining goal of overruling *Smith*); *id.* at 6-7 (same); S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985) (Senate Report) (same).

Section 1415(*l*) provides, in relevant part, as follows:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including Section 504], or other Federal laws protecting the rights of children with disabilities, except that *before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the [administrative] procedures under [the IDEA, 20 U.S.C. 1415(f) and (g)] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].*

20 U.S.C. 1415(*l*) (emphasis added).

The portion of Section 1415(*l*) italicized above sets forth the circumstances in which a plaintiff bringing suit under Title II or Section 504 must first exhaust administrative remedies under the IDEA. That exhaustion requirement is the subject of the petition for certiorari in this case.

2. E.F. is a child with a severe form of cerebral palsy that substantially limits her motor skills and mobility. Pet. App. 3; Resp. App. 6.[2] In the 2009-2010 school year, E.F. attended kindergarten at Ezra Eby Elementary School, which is within the Napoleon Community Schools and Jackson County Intermediate School District (respondents here, along with the principal of Ezra Eby, Pamela Barnes). Pet. App. 4; Resp. App. 5.

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[2] The facts discussed in this brief are drawn from petitioners' complaint and the discussion of the complaint in the decisions below.

In 2009, pursuant to a prescription from E.F.'s doctor, E.F.'s parents and E.F. (collectively, petitioners) obtained Wonder, a trained service dog, to assist E.F. with various functions of ordinary life. Pet. App. 3-4; Resp. App. 2, 6-7. In the fall of 2009 and again in January 2010, respondents informed petitioners that E.F. could not bring Wonder to school. Resp. App. 2, 8. Respondents told E.F.'s parents that E.F.'s then-existing IEP already met her "physical and academic needs." Pet. App. 4; Resp. App. 8. At the time, respondents had a policy that permitted an individual's use of a guide dog in school, but they refused to modify that policy to permit service animals (like Wonder) more generally. See Pet. App. 27; Resp. App. 3, 9.

In April 2010, respondents permitted E.F. to attend school with Wonder for the remainder of the school year. Pet. App. 4; Resp. App. 8. During that time, however, respondents limited E.F.'s use of Wonder, thereby preventing E.F. from participating in certain school activities. Pet. App. 4; Resp. App. 8-9. At the end of the school year, respondents informed petitioners that they would not allow Wonder to accompany E.F. to school during the 2010-2011 school year. Pet. App. 4; Resp. App. 9.

In response, E.F.'s parents removed E.F. from Ezra Eby and home-schooled her for the 2010-2011 and 2011-2012 school years. Resp. App. 9. E.F.'s parents also filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) alleging that respondents violated Title II and Section 504. Pet. App. 4; Resp. App. 9. In May 2012, OCR determined that respondents' denial of E.F.'s use of her service dog violated both statutes. Pet. App. 4; Resp. App. 10. In response, respondents agreed to allow

Wonder to accompany E.F. to school. *Ibid.* But after E.F.'s father met with Principal Barnes to discuss E.F.'s return to Ezra Eby, her parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." Resp. App. 10. They accordingly found a different public school—in a different district—that welcomed E.F. and Wonder. Pet. App. 4; Resp. App. 10-11. E.F. enrolled in that school the following fall. Resp. App. 10-11.

3. In December 2012, petitioners sued respondents for violating (among other statutes) Title II of the ADA and Section 504 of the Rehabilitation Act. See Resp. App. 1-22. They alleged that respondents had unlawfully refused to modify their policies to permit E.F. to use her service animal at school between "fall 2009 and spring 2012." Pet. App. 4-5; see Resp. App. 12-19. Petitioners further alleged that E.F. had suffered harm as a result of the discrimination, including "emotional distress and pain, embarrassment, mental anguish, inconvenience, and loss of enjoyment of life." Resp. App. 11-12. In their prayer for relief, petitioners sought a declaration that respondents had violated both statutes, damages to compensate for the harm suffered by E.F., attorneys' fees, and "any other relief [the district] Court deems appropriate." *Id.* at 21. The complaint did not mention the IDEA, allege that E.F. had been denied a FAPE, or seek damages to remedy any violation of that or any other IDEA provision.

In January 2014, the district court dismissed petitioners' complaint without prejudice under Federal Rule of Civil Procedure 12(c). Pet. App. 37-52. The court held that petitioners had failed to comply with

the IDEA's exhaustion provision, 20 U.S.C. 1415(*l*), insofar as they filed the action without first challenging E.F.'s IEP in accordance with the IDEA's administrative procedures. Pet. App. 5, 42-50.

4. A divided panel of the court of appeals affirmed. Pet. App. 1-20.

a. The panel majority interpreted Section 1415(*l*) to "require[] exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6; see also *id.* at 3, 10-11 (similar formulations). It explained that petitioners' suit must be dismissed because "[t]he core harms that [petitioners] allege arise from the school's refusal to permit E.F. to attend school with Wonder relate to the specific educational purpose of the IDEA" and because petitioners "could have used IDEA procedures to remedy [those] harms." *Id.* at 6; see *id.* at 10-14, 16.

The panel majority acknowledged that petitioners' action sought money damages, and that such damages are "unavailable" under the IDEA. Pet. App. 17. It nonetheless held that the request for money damages "does not in itself excuse the exhaustion requirement," because that would allow plaintiffs to evade that requirement "simply by appending a claim for damages." *Ibid.* (internal quotation marks omitted).

The panel majority also acknowledged that the IDEA procedures "could *at best* require Ezra Eby Elementary to permit Wonder to accompany E.F. at school," and that such an outcome "would *not* at present be effective in resolving [petitioners'] dispute," both because petitioners no longer sought to enroll E.F. at Ezra Eby and because respondents had al-

ready agreed to permit Wonder to accompany E.F. to Ezra Eby following the OCR's 2012 ruling. Pet. App. 17 (emphasis added). The panel noted that petitioners had not argued that these circumstances rendered exhaustion of IDEA procedures futile, and it thus declined to resolve whether exhaustion should be excused on that ground. *Ibid.* Nonetheless, the court strongly suggested that a futility argument would not succeed, because petitioners had voluntarily enrolled E.F. in a different school outside the district. *Id.* at 17-18.

b. Judge Daughtrey dissented. Pet. App. 21-35. She endorsed the interpretation of Section 1415(*l*) set forth by the Ninth Circuit in *Payne* v. *Peninsula School District*, 653 F.3d 863, 875 (2011) (en banc), cert. denied, 132 S. Ct. 1540 (2012), overruled on other grounds by *Albino* v. *Baca*, 747 F.3d 1162 (9th Cir.), cert. denied, 135 S. Ct. 403 (2014). Pet. App. 27-30. She emphasized that under the Ninth Circuit's approach, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA.*" *Id.* at 28 (quoting *Payne*, 653 F.3d at 871). Here, Judge Daughtrey explained, petitioners' Title II and Section 504 claims are based on respondents' failure to grant E.F. equal access to public facilities and programs, not on any failure to protect her education-related rights under the IDEA. *Id.* at 21-22, 25-27.

5. The court of appeals denied rehearing en banc, with Judge Daughtrey dissenting. Pet. App. 53-54.

DISCUSSION

The court of appeals incorrectly affirmed the dismissal of petitioners' ADA and Rehabilitation Act

claims for failure to comply with the IDEA's exhaustion provision, 20 U.S.C. 1415(*l*). The court's decision is at odds with the plain text of Section 1415(*l*), and it deepens an entrenched circuit split over the proper interpretation of that provision. The question presented raises an important and recurring issue that has significant consequences for children with disabilities who seek to vindicate their rights under federal anti-discrimination statutes. This Court should grant certiorari to resolve the split and reverse the decision below.

A. The Court Of Appeals' Decision Was Incorrect

1. The court of appeals erred in holding that petitioners' claims were properly dismissed under Section 1415(*l*). Its interpretation of that provision contravenes the plain text of Section 1415(*l*) and leads to unsound results.

a. Section 1415(*l*) makes clear that the IDEA is not the exclusive mechanism for vindicating the rights of children with disabilities through litigation. It expressly contemplates that aggrieved parties may invoke other statutes—including Title II of the ADA and Section 504 of the Rehabilitation Act—to secure relief for a violation of the substantive standards established in those statutes. 20 U.S.C. 1415(*l*). Section 1415(*l*) places a single restriction on such non-IDEA litigation: It states that potential litigants must exhaust the IDEA's administrative procedures "before the filing of a *civil action* under [Title II, Section 504, or other specified laws] *seeking relief that is also available* under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added).

By its plain terms, Section 1415(*l*)'s exhaustion requirement applies only to "civil action[s] * * * seek-

ing relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). To determine whether any particular "civil action" triggers that requirement, a court must first determine precisely what "relief" that action is "seeking." *Ibid.* To do so, the court must examine the complaint, and especially the prayer for relief specifically identifying the remedy the plaintiff is asking the court to award. See *Random House Webster's Unabridged Dictionary* 1733 (2d ed. 2001) (*Webster's*) (defining "seek" as, among other things, "to try to obtain," "to ask for," and "[to] request").

Once the court identifies the "relief" the "civil action" is "seeking," the court must then determine whether that requested relief is "available" under the IDEA. 20 U.S.C. 1415(*l*). A form of relief is "available" under the IDEA if it is "readily obtainable" or "accessible" under that statute. *Webster's* 142. That inquiry ultimately turns on whether the IDEA would authorize a court or state agency to award the desired relief if the plaintiff had exhausted administrative remedies or brought suit under the IDEA.

If the requested relief *is* available under the IDEA, the non-IDEA civil action may proceed only if the plaintiff has previously exhausted the IDEA's administrative procedures or if the unexhausted claims are eliminated from the action. 20 U.S.C. 1415(*l*); see, *e.g.*, *Jones* v. *Block*, 549 U.S. 199, 219-224 (2007). But if the requested relief is *not* available under the IDEA, exhaustion is *not* required and the civil action may proceed regardless of whether the plaintiff has previously pursued his or her claim using the IDEA process.

b. This straightforward interpretation of Section 1415(*l*)'s exhaustion requirement follows directly from

the statute's text. As this Court has often emphasized, "when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009).

It also faithfully implements Section 1415(*l*)'s purpose. As noted, Congress enacted Section 1415(*l*) in order to overturn *Smith* v. *Robinson*, 468 U.S. 992 (1984), and "reaffirm * * * the viability of" other antidiscrimination provisions as "*separate* vehicles for ensuring the rights of handicapped children." House Report 4 (emphasis added); see p. 5, *supra*. The exhaustion requirement advances that goal by ensuring that if a plaintiff does not seek relief that is available under the IDEA, he or she may immediately invoke other freestanding federal causes of action that likewise protect the rights of children with disabilities. In such circumstances, there is no need for plaintiffs to expend time and resources engaging in an IDEA administrative process that cannot provide the particular relief that the plaintiff seeks.

Finally, the interpretation of Section 1415(*l*) set forth above advances commonsense principles embodied in this Court's administrative-exhaustion cases more generally. The Court has recognized that exhaustion requirements generally serve the "twin purposes" of "protecting * * * agency authority" and "promoting judicial efficiency." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992). But the Court has also recognized a general exception to such requirements when the agency "lack[s] authority to grant the type of relief requested." *Id.* at 148. In such circumstances, there is no threat to the agency's authority, because the agency lacks the authority to award the requested relief. And requiring exhaustion is also

*in*efficient, insofar as the administrative process cannot grant the plaintiff the desired relief and thus would not eliminate the need for litigation. See *Montana Nat'l Bank of Billings* v. *Yellowstone Cnty.*, 276 U.S. 499, 505 (1928) (noting that exhaustion when an agency lacks authority to grant relief would be "utterly futile"). Section 1415(*l*) reflects these principles and does not require exhaustion of IDEA processes unless the plaintiff is "seeking relief" that is actually "available" in IDEA proceedings.

c. Section 1415(*l*)'s exhaustion requirement does not apply to petitioners' Title II and Section 504 claims. The "REQUEST FOR RELIEF" set forth in petitioners' complaint asks the court to (1) "[e]nter judgment" in petitioners' favor as to both claims; (2) "[i]ssue a declaration" stating that respondents violated E.F.'s rights under both statutes; (3) "[a]ward [E.F.] damages in an amount to be determined at trial"; (4) "[a]ward attorneys' fees pursuant to" the ADA, Rehabilitation Act, and 42 U.S.C. 1988; and (5) "[g]rant any other relief this Court deems appropriate." Resp. App. 21.

None of those forms of relief is "available under [the IDEA]." 20 U.S.C. 1415(*l*). The IDEA does not entitle a plaintiff to obtain a judgment or declaratory relief stating that the defendant violated the ADA or Section 504, and petitioners have not sought a declaration that the IDEA's substantive standards have been violated. Nor does the IDEA entitle a prevailing plaintiff to obtain money damages to compensate for harms suffered as a result of its substantive standards. See pp. 4-5, *supra*. And although the IDEA authorizes an award of attorneys' fees, it does so only

"[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. 1415(i)(3)(B)(i).

Finally, the complaint's boilerplate request for "any other relief this Court deems appropriate," Resp. App. 21, cannot reasonably be construed as seeking relief available under the IDEA. As noted above, the IDEA authorizes relief in the form of (1) future special education and related services to ensure a FAPE or redress the past denial of a FAPE, and (2) financial compensation to reimburse parents for past educational expenditures that should have been borne by the State. See pp. 4-5, *supra*. The complaint makes clear that E.F. has successfully integrated into a new school outside respondents' district, and it does not request future educational services or seek reimbursement for past educational expenses. See Resp. App. 10-12, 21.

2. The court of appeals held that Section 1415(*l*) requires a plaintiff to exhaust the IDEA's administrative process whenever "the injuries alleged can be remedied through IDEA procedures." Pet. App. 6. It dismissed petitioners' Title II and Section 504 claims after concluding that they "relate to the specific educational purpose of the IDEA" and thus can be remedied under that statute. *Ibid.* The court was mistaken.

a. Most fundamentally, the court of appeals erred by focusing on whether the harms alleged by the plaintiff are capable of being remedied, in some fashion, by the IDEA. Pet. App. 6, 10. That approach violates the text of Section 1415(*l*). Under that provision, the question is *not* whether the plaintiff has alleged harms that might conceivably be addressed in administrative proceedings or litigation under the

IDEA. Rather, the question mandated by the text is whether the plaintiff's "civil action" is "seeking relief" that the IDEA makes "available." 20 U.S.C. 1415(*l*). The court's approach ignores the statutory language that focuses the exhaustion inquiry on the particular "relief" that the plaintiff's "civil action" actually "seek[s]." *Ibid.*[3]

The court of appeals did not engage in any significant textual analysis justifying its interpretation of Section 1415(*l*). Instead, the court appeared to ground its analysis on a perceived need "to preserve the primacy the IDEA gives to the expertise of state and local agencies" in determining whether a child has been denied a FAPE under the IDEA. Pet. App. 9-10; *id.* at 9-14. But although Section 1415(*l*) preserves an important role for state and local agencies with respect to civil actions seeking relief that *is* "available" under the IDEA—even when the action is brought under other statutes—it does not recognize their "primacy" over actions that do *not* seek such relief. 20 U.S.C. 1415(*l*). Congress enacted Section 1415(*l*) with the specific goal of preserving the viability of non-IDEA causes of action as "separate vehicles" for protecting the rights of children with disabilities. House Report 4. It did not require IDEA procedures to be exhausted in circumstances where the plaintiff seeks only relief that cannot be awarded under the IDEA.

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[3] The IDEA's exhaustion requirement differs from that of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), which requires any prisoner challenging conditions of confinement to exhaust "such administrative remedies *as are available*" before instituting any suit, regardless of whether the lawsuit seeks relief that the administrative proceedings could provide. See *Booth* v. *Churner*, 532 U.S. 731, 738-739 (2001).

Notably, the court of appeals acknowledged that the relief actually sought by petitioners' civil action—primarily, money damages—is "unavailable" under the IDEA. Pet. App. 17. That should have ended the inquiry. The court concluded otherwise by asserting that focusing exclusively on the requested relief would allow plaintiffs to "evade the exhaustion requirement simply by appending a claim for money damages." *Ibid.* (internal quotation marks omitted). The court was mistaken. Under Section 1415(*l*)'s plain language, a plaintiff who seeks relief that *is* available under the IDEA cannot avoid exhaustion simply by also tacking on a request for damages. The exhaustion requirement unambiguously applies to any claim for relief that is available under the IDEA, and the plaintiff would not be able to proceed on any such claim. See, *e.g.*, *Jones*, 549 U.S. at 219-224 (permitting dismissal of unexhausted claims); *Cassidy* v. *Indiana Dep't of Corr.*, 199 F.3d 374, 376-377 (7th Cir. 2000).

b. This case illustrates the inefficient and unsound results that flow from the court of appeals' interpretation of Section 1415(*l*). At the time petitioners filed this action, respondents had already agreed to allow Wonder to accompany E.F. to Ezra Eby for the 2012-2013 school year, and petitioners had already decided to enroll E.F. in a different school in a different district. See p. 8, *supra*. Respondents were no longer providing E.F. with an education, and petitioners did not request compensatory special education or related services. There was therefore no live dispute between the parties as to the content of E.F.'s ongoing IEP.

In these circumstances, it makes no sense to require petitioners to engage in the IDEA administrative process before filing suit against respondents.

The purpose of that administrative process is to resolve disputes over a child's ongoing educational program under the IDEA, not to adjudicate whether a school violated Title II and Section 504 at some time in the past. Given that respondents had already agreed that Wonder would be permitted to accompany E.F. to school—and that petitioners did not seek any further education-related services from respondents—there was no need for the IDEA process to consider whether Wonder should be part of E.F.'s IEP or whether forbidding Wonder from accompanying E.F. would deny her a FAPE. Even if petitioners had participated in the IDEA administrative process—and had prevailed on every issue—petitioners would have had to file exactly the same suit under Title II and Section 504 in order to obtain their desired relief. See Pet. App. 17 (acknowledging this point). Requiring petitioners and respondents to engage in the IDEA process as a precondition for litigating their Title II and Section 504 claims in court would waste time and resources without offering any chance of resolving their actual dispute. Congress did not intend such a result.

B. The Courts Of Appeals Are Split As To The Proper Interpretation Of Section 1415(*l*)'s Exhaustion Requirement

The decision below further entrenches an acknowledged circuit split over the proper interpretation and application of Section 1415(*l*)'s exhaustion requirement. Although the full scope of the split is not entirely clear, at least four circuits—including the First, Second, Seventh, and Eleventh—would likely agree with the Sixth Circuit that petitioners were required to exhaust their Title II and Section 504 claims. By

contrast, the Ninth Circuit would almost certainly not require exhaustion in these circumstances. This Court should grant certiorari to resolve the conflict.

1. The parties agree that the First, Second, Seventh, and Eleventh Circuits would concur with the Sixth Circuit that the IDEA's exhaustion requirement applies to this case and requires dismissal of petitioners' Title II and Section 504 claims. Pet. 12-16; Br. in Opp. 20-22. As they correctly explain, those courts of appeals generally interpret Section 1415(*l*) to require exhaustion whenever the IDEA can provide some relief for the injury alleged in the complaint, regardless of whether the plaintiff's civil action invokes the IDEA or actually requests the form of relief that might be available under that statute.[4]

The Third and Tenth Circuits also generally apply the injury-centered approach to Section 1415(*l*).[5] But both circuits appear to recognize a futility exception to the exhaustion requirement in circumstances where the underlying educational dispute between the parties has essentially been resolved and the only remaining issue is the availability of damages.[6] It is possible

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[4] See, *e.g.*, *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 59-64 (1st Cir. 2002); *Polera* v. *Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486-491 (2d Cir. 2002); *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991-993 (7th Cir. 1996); *N.B., by her mother and next friend, D.G.* v. *Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1378-1379 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1092 (1997).

[5] See, *e.g.*, *Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 272-273, 276-277 (3d Cir. 2014); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1066-1068 (10th Cir. 2002).

[6] See, *e.g.*, *Batchelor*, 759 F.3d at 280 (favorably citing *Vicky M.* v. *Northeastern Intermediate Unit 19*, 486 F. Supp. 2d 437, 452-455 (M.D. Pa. 2007), for proposition that "exhaustion would be

that the Third and Tenth Circuits would hold that exhaustion is not required here, because petitioners seek no further educational services for E.F. from respondents, and the only outstanding dispute is over petitioners' request for money damages. See p. 8, *supra*.

2. By contrast, the en banc Ninth Circuit has expressly rejected the "injury-centered" interpretation of Section 1415(*l*) in favor of a "relief-centered" approach. *Payne* v. *Peninsula Sch. Dist.*, 653 F.3d 863, 874 (2011), cert. denied, 132 S. Ct. 1540 (2012), overruled on other grounds by *Albino* v. *Baca*, 747 F.3d 1162 (9th Cir.), cert. denied, 135 S. Ct. 403 (2014). Under the Ninth Circuit's interpretation, "[t]he IDEA's exhaustion requirement applies to claims only to the extent that the relief *actually sought by the plaintiff* could have been provided by the IDEA." *Ibid.* The court has explained that exhaustion is required in three circumstances: (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent"; (2) when "a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student"; and (3) when "a plaintiff is seeking to enforce rights that arise as a result of a denial of a [FAPE]," whether or not the claim is pled as a violation of the IDEA. *Id.* at 875.

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futile where plaintiffs sought damages for physical abuse and where no other educational issues needed resolution"); *Muskrat* v. *Deer Creek Pub. Sch.*, 715 F.3d 775, 785-786 (10th Cir. 2013) (holding that exhaustion was not required where parents had resolved their educational dispute without formally invoking IDEA administrative procedures, leaving only their claim for damages unresolved).

As petitioners explain (Pet. 17), the Ninth Circuit's approach does not require exhaustion of their Title II and Section 504 claims against respondents. There is no dispute that those claims do not fall within the first or second categories identified in *Payne*. And although respondents assert that this case falls within the third category—because petitioners' claims "arise[] only as a result of a denial of a FAPE"—they are mistaken. Br. in Opp. 28 (quoting *Payne*, 653 F.3d at 880); see Pet. App. 11 (stating that petitioners "in effect" allege the denial of a FAPE).

Payne's third category encompasses claims in which the denial of a FAPE is "the basis for the cause of action," *i.e.*, where the claim either arises under the IDEA itself or directly invokes the IDEA's "substantive standards." 653 F.3d at 875.[7] Here, however, petitioners' Title II and Section 504 claims are not based on the denial of a FAPE and do not require petitioners to establish a violation of the IDEA's "substantive standards." The Ninth Circuit—unlike the Sixth Circuit—would therefore not have dismissed those claims for failure to exhaust under Section 1415(*l*).

3. Petitioners are correct (Pet. 18) that the circuit conflict discussed above is unlikely to resolve itself without this Court's intervention. The Ninth Circuit's

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[7] The Ninth Circuit indicated that *Payne*'s third category thus includes IDEA claims, Section 504 claims expressly "premised on the denial of a FAPE," and substantive due process claims in which the plaintiff asserts that he has been deprived of a FAPE. *Payne*, 653 F.3d at 875, 883; see *id.* at 879 (indicating that exhaustion is not required when complaint "does not either *rely on rights created by the IDEA* or seek remedies available under the IDEA) (emphasis added); see also Pet. 16 n.8.

en banc decision in *Payne* expressly overruled circuit precedent that had previously applied the same injury-centered approach that has been adopted by many of the other circuits. See 653 F.3d at 873-874 (expressly overruling those aspects of *Robb* v. *Bethel Sch. Dist. No. 403*, 308 F.3d 1047 (9th Cir. 2002), which adopted the injury-centered approach). The Sixth Circuit required exhaustion here despite Judge Daughtrey's express recognition that the panel majority's analysis conflicted with *Payne*. Pet. App. 27-30. And the Second, Third, and Tenth Circuits have either adopted or reaffirmed the injury-centered approach even after *Payne* expressly rejected that approach. See *Batchelor*, 759 F.3d at 276-278; *Baldessarre* v. *Monroe-Woodbury Cent. Sch. Dist.*, 496 Fed. Appx. 131, 134 (2d Cir. 2012); *A.F.* v. *Espanola Pub. Sch.*, 801 F.3d 1245, 1247 (10th Cir. 2015).

C. The Question Presented Is Important And Recurring, And The Court Should Resolve It In This Case

The proper application of Section 1415(*l*)'s exhaustion requirement to non-IDEA claims presents an important and recurring question of federal law. Whether and how the exhaustion requirement applies to circumstances where the plaintiff does not directly request relief that is available under the IDEA is frequently litigated, as the petition, brief in opposition, and discussion above all make clear. See Pet. 12-18; Br. in Opp. 20-28. Moreover, the courts are intractably divided over those questions. See pp. 18-22, *supra*.

The proper resolution of that question has considerable practical significance, especially for plaintiffs seeking to vindicate the rights of children with disabilities. If petitioners' (and the government's) interpre-

tation of Section 1415(*l*) is correct, children with disabilities and their parents are being forced to needlessly pursue the IDEA administrative process—at considerable expense and inconvenience—even in circumstances when that process will not provide them with the relief that they actually seek. This case offers the Court a suitable vehicle in which to clarify the law and effectuate Congress's goal of preserving freestanding causes of action—apart from the IDEA—as viable mechanisms for protecting children with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
JESSICA WOLLAND
RHONDA WEISS
Attorneys
U.S. Department of Education

MAY 2016

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 22 2016
OFFICE OF THE CLERK

No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

Counsel for Petitioners

NEAL KUMAR KATYAL
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondents

August 22, 2016

Petition for Writ of Certiorari filed October 15, 2015

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Relevant Docket Entries United States District Court for the Eastern District of Michigan (Detroit), No. 2:12-cv-15507-LPZ-DRG ..... JA 1

Relevant Docket Entries United States Court of Appeals for the Sixth Circuit, No. 14-1137 ..... JA 8

Exhibit A to the Complaint (December 17, 2012) ..... JA 16

The following have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Appendix A Opinion/Judgment in the United States Court of Appeals for the Sixth Circuit (June 12, 2015) ..... App. 1

Appendix B Opinion and Order/Judgment in the United States District Court, Eastern District of Michigan Southern Division (January 10, 2014) ..... App. 37

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Sixth Circuit (August 5, 2015) ..... App. 53

Appendix D Statutes and Regulation

20 U.S.C. § 1415 ..... App. 55
29 U.S.C. § 794 ..... App. 91
42 U.S.C. § 12131 ..... App. 93
42 U.S.C. § 12132 ..... App. 94
42 U.S.C. § 12133 ..... App. 94
42 U.S.C. § 12134 ..... App. 95
28 C.F.R. § 35.136 ..... App. 96

The following have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Brief in Opposition:

Petitioners' Complaint ..... Resp. App. 1

20 U.S.C. §1400 ..... Resp. App. 23

20 U.S.C. §1401 ..... Resp. App. 30

34 C.F.R. §300.34 ..... Resp. App. 49

34 C.F.R. §300.39 ..... Resp. App. 56

34 C.F.R. §300.43 ..... Resp. App. 58

RELEVANT DOCKET ENTRIES

United States District Court for the Eastern District of Michigan (Detroit)

2:12-cv-15507-LPZ-DRG

EF v. Napoleon Community Schools, et al.

Date Filed	#	Docket Text
12/17/2012	1	COMPLAINT filed by E. F. against Pamela Barnes, Jackson County Intermediate School District, Napoleon Community Schools with Jury Demand. Plaintiff requests summons issued. Receipt No: 0645-3858882 - Fee: $ 350. County of 1st Plaintiff: Jackson - County Where Action Arose: Jackson - County of 1st Defendant: Jackson. [Previously dismissed case: No] [Possible companion case(s): None] (Kellett, Peter) (Entered: 12/17/2012)
12/18/2012		NOTICE of Error directed to: Peter M. Kellett re 1 Complaint,,. Parties listed on the initiating document were omitted. The filing attorney must use the docket event Addition of Parties to correct the error. [No Image

		Associated with this docket entry] (DTyl) (Entered: 12/18/2012)
12/18/2012	2	SUMMONS Issued for *Pamela Barnes, Jackson County Intermediate School District, Napoleon Community Schools* (DTyl) (Entered: 12/18/2012)
12/18/2012		Addition of Parties to CM/ECF: Plaintiffs Stacy Fry, Brent Fry. Reason: The party was not added to CM/ECF when e-filing 1 Complaint,, (Kellett, Peter) (Entered: 12/18/2012)
12/18/2012	3	NOTICE of Appearance by Brandon M. Blazo on behalf of All Plaintiffs. (Blazo, Brandon) (Entered: 12/18/2012)
12/18/2012	4	NOTICE of Appearance by James F. Hermon on behalf of EF. (Hermon, James) (Entered: 12/18/2012)
12/18/2012	5	NOTICE of Appearance by Michael J. Steinberg on behalf of All Plaintiffs. (Steinberg, Michael) (Entered: 12/18/2012)
01/10/2013	6	CERTIFICATE of Service/Summons Returned Executed. Napoleon Community Schools served on 12/31/2012, answer due 1/22/2013. (Blazo,

		Brandon) (Entered: 01/10/2013)
01/10/2013	7	CERTIFICATE of Service/Summons Returned Executed. Jackson County Intermediate School District served on 12/29/2012, answer due 1/22/2013. (Blazo, Brandon) (Entered: 01/10/2013)
01/10/2013	8	ATTORNEY APPEARANCE: Denise M. Heberle appearing on behalf of All Plaintiffs (Heberle, Denise) (Entered: 01/10/2013)
01/11/2013	9	NOTICE of Appearance by Timothy J. Mullins on behalf of All Defendants. (Mullins, Timothy) (Entered: 01/11/2013)
01/18/2013	10	ORDER DISMISSING PLAINTIFF'S STATE-LAW CLAIM Signed by District Judge Lawrence P. Zatkoff. (MVer) (Entered: 01/18/2013)
02/11/2013	11	ANSWER to Complaint with Affirmative Defenses with Jury Demand by All Defendants. (Mullins, Timothy) (Entered: 02/11/2013)
02/11/2013	12	NOTICE of Appearance by Kenneth B. Chapie on behalf of All Defendants. (Chapie, Kenneth) (Entered: 02/11/2013)

02/13/2013	13	NOTICE TO APPEAR: **Scheduling Conference set for 3/26/2013 10:30 AM before District Judge Lawrence P. Zatkoff IN PORT HURON** (MVer) (Entered: 02/13/2013)
03/21/2013	14	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Blazo, Brandon) (Entered: 03/21/2013)
03/26/2013		Minute Entry - Scheduling Conference held on 3/26/2013 before District Judge Lawrence P. Zatkoff. (MVer) (Entered: 03/26/2013)
04/04/2013	15	ANSWER to Complaint with Affirmative Defenses with Jury Demand *AMENDED* by All Defendants. (Mullins, Timothy) (Entered: 04/04/2013)
04/05/2013	16	SCHEDULING ORDER: **Discovery due by 10/10/2013 Dispositive Motion Cut-off set for 10/31/2013 Final Pretrial Conference set for 3/13/2014 10:00 AM before District Judge Lawrence P. Zatkoff** Signed by District Judge Lawrence P. Zatkoff. (Refer to image for additional dates) (MVer) (Entered: 04/05/2013)

07/24/2013	17	MOTION to Dismiss by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1. COMPLAINT, # 3 Exhibit 2. MICHIGAN DEPARTMENT OF EDUCATION SAFEGUARD MANUAL, # 4 Exhibit 3. MICHIGAN DEPARTMENT OF EDUCATION SPECIAL EDUCATION DUE PROCESS COMPLAINT PROCEDURES, # 5 Exhibit 4. SHARBOWSKI V UTICA COMMUNITY SCHOOLS) (Mullins, Timothy) (Entered: 07/24/2013)
08/19/2013	18	RESPONSE to 17 MOTION to Dismiss *Response to Motion for Judgment on the Pleadings* filed by All Plaintiffs. (Hermon, James) (Entered: 08/19/2013)
09/04/2013	19	REPLY to Response re 17 MOTION to Dismiss filed by All Defendants. (Mullins, Timothy) (Entered: 09/04/2013)
10/01/2013	20	STIPULATION AND ORDER STAYING SCHEDULING ORDER UNTIL MOTION TO DISMISS IS DECIDED Signed by District Judge Lawrence P. Zatkoff. (MVer) (Entered: 10/01/2013)

12/04/2013	21	NOTICE of Appearance by Susan Asam on behalf of EF. (Asam, Susan) (Entered: 12/04/2013)
12/04/2013	22	NOTICE of Withdrawal of Attorney Brandon M. Blazo for on behalf of All Plaintiffs. (Blazo, Brandon) (Entered: 12/04/2013)
01/10/2014	23	ORDER granting 17 Motion to Dismiss. Signed by District Judge Lawrence P. Zatkoff. (MVer) (Entered: 01/10/2014)
01/10/2014	24	JUDGMENT in favor of Defendant Signed by District Judge Lawrence P. Zatkoff. (MVer) (Entered: 01/10/2014)
02/05/2014	25	NOTICE OF APPEAL by All Plaintiffs. Receipt No: 0645-4487942 - Fee: $ 505 - Fee Status: Fee Paid. (Asam, Susan) (Entered: 02/05/2014)
02/05/2014	26	Certificate of Service re 25 Notice of Appeal. (TMcg) (Entered: 02/05/2014)
06/12/2015	27	JUDGMENT from U.S. Court of Appeals - Sixth Circuit re 25 Notice of Appeal filed by Stacy Fry, EF, Brent Fry [Appeal Case Number 14-1137] (KCla) (Entered: 06/29/2015)

08/18/2015	28	MANDATE from U.S. Court of Appeals - Sixth Circuit as to 25 Notice of Appeal filed by Stacy Fry, EF, Brent Fry [Appeal Case Number 14-1137] (KCla) (Entered: 08/25/2015)
10/23/2015	29	LETTER from the US Supreme Court that a petition for writ of certiorari was filed on 10/15/2015. [Supreme Court Case Number: 15-497] [Court of Appeals Case Number: 14-1137] (Ahmed, N) (Entered: 10/23/2015)
06/28/2016	30	LETTER from the US Supreme Court granting the petition for writ of certiorari [Supreme Court Case Number: 15-497] [Court of Appeals Case Number: 14-1137] (Ahmed, N) (Entered: 06/28/2016)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

14-1137

Stacy Fry, et al. v. Napoleon Community Schools, et al.

02/06/2014	1	Civil Case Docketed. Notice filed by Appellants EF, Brent Fry and Stacy Fry. Transcript needed: n. (JRH)
02/06/2014	2	The case manager for this case is: Jeanine Hance (JRH)
02/06/2014	3	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 03/21/2014; appellee brief due 04/23/2014. (JRH)
02/10/2014	4	Mediation Office is involved in this appeal. (LMR)
02/10/2014	5	A Telephone Mediation conference has been scheduled for 03/05/2014 at 9:30 AM (ET) with Deborah Ginocchio. [Please open notice for important details and deadlines.] (LMR)
02/12/2014	6	The Telephone Mediation conference has been rescheduled for 03/27/2014 at 9:30 AM (ET) with Deborah Ginocchio. [Please open notice for important details and deadlines.] (LMR)

02/12/2014	7	BRIEFING LETTER SENT by Mediation Office, resetting briefing schedule: appellant brief now due 04/11/2014. appellee brief now due 05/14/2014. (LMR)
02/19/2014	8	APPEARANCE filed for Appellees Pamela Barnes, Jackson County Intermediate School District and Napoleon Community Schools by Timothy J. Mullins. Certificate of Service: 02/19/2014. (TJM)
02/19/2014	9	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Timothy John Mullins for Appellee Jackson County Intermediate School District. Certificate of Service: 02/19/2014.--[Edited 02/19/2014 by JRH] (TJM)
02/19/2014	10	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Timothy John Mullins for Appellee Napoleon Community Schools. Certificate of Service: 02/19/2014.--[Edited 02/19/2014 by JRH] (TJM)
02/19/2014	11	APPEARANCE filed for EF and Appellants Brent Fry and Stacy Fry by James F. Hermon. Certificate of Service: 02/19/2014. (JFH)
02/19/2014	12	CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by

Attorney Mr. James Frederick Hermon for Appellants Stacy Fry and Brent Fry. Certificate of Service:02/19/2014. (JFH)

02/19/2014 13 CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. James Frederick Hermon for Appellants Stacy Fry and Brent Fry Certificate of Service: 02/19/2014. (JFH)

02/19/2014 14 TRANSCRIPT ORDER FORM filed by Mr. James Frederick Hermon for Stacy Fry and Brent Fry; Transcript not needed. Certificate of Service: 02/19/2014. (JFH)

03/17/2014 15 The Telephone Mediation Conference has been rescheduled for 04/14/2014 at 1:30 PM (ET) with Deborah Ginocchio. [Please open notice for important details and deadlines.] (MLB)

03/17/2014 16 BRIEFING LETTER SENT by Mediation Office, resetting briefing schedule: appellant brief now due 04/28/2014. appellee brief now due 06/02/2014. (MLB)

04/14/2014 17 Mediation Office is no longer involved in this appeal. (MLB)

04/28/2014 18 **LOCKED**APPELLANT BRIEF filed by Mr. James Frederick

Hermon for Stacy Fry and Brent Fry. Certificate of Service:04/28/2014. Argument Request: requested.(CORRECTIONS NEEDED-SEE LETTER)--[Edited 04/28/2014 by JRH] (JFH)

04/28/2014 19 BRIEFING LETTER SENT requesting brief corrections from Mr. James Frederick Hermon for Stacy Fry and Brent Fry due to the incorrect PAGE ID#s used in the citations of the brief and on the Designation of Relevant District Court Documents Page. Corrections due: 05/12/2014., resetting briefing schedule: appellee brief now due 06/16/2014. (JRH)

04/28/2014 20 CORRECTED APPELLANT'S BRIEF filed by Mr. James Frederick Hermon for Stacy Fry and Brent Fry. Certificate of Service:04/28/2014. Argument Request: requested.--[Edited 06/17/2014 by JRH] (JFH)

06/16/2014 21 APPELLEE BRIEF filed by Mr. Timothy John Mullins for Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District. Certificate of Service:06/16/2014. Argument Request: requested. (TJM)

07/03/2014 22 **LOCKED**REPLY filed by Mr. James Frederick Hermon for Stacy Fry and Brent Fry regarding Reply *Brief of Plaintiffs-Appellants Stacy Fry, Brent Fry, And EF, A Minor, By Her Next Friends Stacy Fry And Brent Fry*. Certificate of Service: 07/03/2014. (INCORRECT RELIEF - SHOULD BE FILED AS A "REPLY BRIEF"- PLEASE REFILE)--[Edited 07/03/2014 by JRH] (JFH)

07/03/2014 23 REPLY BRIEF filed by Attorney Mr. James Frederick Hermon for Appellants Stacy Fry and Brent Fry. Certificate of Service:07/03/2014. (JFH)

08/13/2014 24 Oral argument date set for 9:00 am October 1, 2014. Notice of argument sent to counsel on 08/13/2014. (DC)

08/14/2014 25 Oral argument acknowledgement filed by Attorney Mr. James Frederick Hermon for Appellants Stacy Fry and Brent Fry. Certificate of Service: 08/14/2014. (JFH)

08/27/2014 26 APPEARANCE filed for Appellees Pamela Barnes and Jackson County Intermediate School District by Kenneth B. Chapie. Certificate of Service: 08/27/2014. (KBC)

08/27/2014 27 **LOCKED**Oral argument acknowledgement filed by Attorney

Mr. Timothy John Mullins for Appellees Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District. Certificate of Service: 08/27/2014. (INCORRECT ACCOUNT USED - REFILE)--[Edited 08/27/2014 by JRH] (TJM)

08/27/2014 28 Oral argument acknowledgement filed by Attorney Mr. Kenneth Bennett Chapie for Appellees Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District. Certificate of Service: 08/27/2014. (KBC)

10/01/2014 29 CAUSE ARGUED by Mr. James Frederick Hermon for Appellants Stacy Fry and Brent Fry and Mr. Timothy John Mullins for Appellees Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District before Daughtrey, Circuit Judge; Rogers, Circuit Judge and Donald, Circuit Judge. (KSC)

11/12/2014 30 APPEARANCE filed for EF and Appellants Brent Fry and Stacy Fry by Michael J. Steinberg. Certificate of Service: 11/12/2014. (MJS)

06/12/2015 31 OPINION and JUDGMENT filed : The judgment of the district court is AFFIRMED. Decision for publication. Martha Craig Daughtrey (DISSENTING), John M. Rogers (AUTHORING), and Bernice Bouie Donald, Circuit Judges. (CL)

06/25/2015 32 APPEARANCE filed for EF and Appellants Brent Fry and Stacy Fry by Jill M. Wheaton. Certificate of Service: 06/25/2015. (JMW)

06/25/2015 33 APPEARANCE filed for EF and Appellants Brent Fry and Stacy Fry by Theodore J. Greeley. Certificate of Service: 06/25/2015. (TJG)

06/26/2015 34 APPEARANCE filed for EF and Appellants Brent Fry and Stacy Fry by Samuel R. Bagenstos. Certificate of Service: 06/26/2015. (SRB)

06/26/2015 35 PETITION for en banc rehearing filed by Mr. Theodore Joseph Greeley for Stacy Fry and Brent Fry. Certificate of Service: 06/26/2015. (TJG)

07/02/2015 36 LETTER SENT to Mr. Kenneth Bennett Chapie for Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District, notifying that he is directed to respond to petition for en banc rehearing filed by Mr. Theodore

Joseph Greeley. Response due 07/16/2015. (BLH)

07/16/2015 37 RESPONSE to petition for en banc rehearing, [35], previously filed by filed by Mr. Theodore Joseph Greeley in 14-1137. Response filed by Mr. Timothy John Mullins for Napoleon Community Schools, Pamela Barnes and Jackson County Intermediate School District. Certificate of service: 07/16/2015. (TJM)

08/05/2015 38 ORDER filed denying petition for en banc rehearing [35] filed by Mr. Theodore Joseph Greeley. Martha Craig Daughtrey, John M. Rogers, and Bernice Bouie Donald, Circuit Judges. (BLH)

08/18/2015 39 MANDATE ISSUED with no costs taxed. (PJE)

10/23/2015 40 U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellant Stacy Fry. Supreme Court Case No:15-497, 10/15/2015. (CL)

06/28/2016 41 U.S. Supreme Court letter filed granting the petition for a writ of certiorari [40] filed by Stacy Fry.. Supreme Court Case No: 15-497, 06/28/2016.. (CL)

COMPLAINT
[R. 1 12/17/12]

EXHIBIT A

UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, REGION XV

600 SUPERIOR AVENUE EAST, SUITE 750
CLEVELAND, OH 44114-2611

REGION XV
MICHIGAN
OHIO

MAY 03 2012

Jordan M. Bullinger, Esquire
LaPointe & Butler, P.C.
Attorneys at Law
2143 Commons Parkway
Okemos, Michigan 48864-3987

Re: OCR Docket #15-10-1268 and #15-10-1269

Dear Mr. Bullinger:

This letter is to inform you of the disposition of the above-referenced complaints filed against the Napoleon Community Schools (the District) and the Jackson County Intermediate School District (the ISD), which the U.S. Department of Education (Department), Office for Civil Rights (OCR) received on July 30, 2010. The Complainant alleged that the District and the ISD discriminated against an elementary school student (the Student) on the basis of her disabilities. Specifically, the Complainant alleged that: (1) the

District and the ISD excluded the Student from and/or limited her participation in their educational programs and activities when they refused to allow the Student to have her dog, a trained service animal, accompany her to school; and (2) the District treated the Student differently from students without disabilities by limiting her outside recess activities choices when students without disabilities were not required to similarly limit their choices.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq*., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As recipients of Federal financial assistance from the Department and as a public school system, the District and the ISD are subject to these laws. OCR therefore had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following issues:

- whether the District and the ISD (collectively, the Recipients) excluded a qualified student with a disability from participation in, denied her the benefits of, or otherwise subjected the student to discrimination on the basis of disability in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(a) and the Section 504 implementing regulation at 34 C.F.R. § 104.4(a);

- whether the Recipients afforded a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that was not equal to that afforded to others in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(1)(ii) and the Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1)(ii); and

- whether the District provided different or separate aids, benefits, or services to a qualified student with a disability without such action being necessary to provide the student with the aid, benefit, or service that is as effective as that provided to others in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(1)(iv) and the Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1)(iv).

In conducting its investigation, OCR reviewed information and documentation provided by both the Complainant and the Recipients. After a careful analysis, OCR has determined that the evidence is sufficient to conclude that the Recipients excluded the Student from and/or limited her participation in their educational programs and activities when they refused to allow her to have her service animal accompany her in parts of the school's program in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(a) and the Section 504 implementing regulation at 34 C.F.R. § 104.4(a). In addition, OCR has determined that the Recipients did not afford the Student an opportunity to participate in or benefit from an aid, benefit, or service that was not equal to that afforded to others in

violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(1)(ii) and the Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1)(ii). With respect to the alleged different treatment regarding recess, prior to the completion of OCR's investigation of that issue, the Recipients asked to resolve the complaint allegation pursuant to Section 302 of OCR's case processing manual.

- **Summary of Case Investigation – Service Animal Allegation**

The Student is eight years old and has cerebral palsy, which significantly limits her motor skills and mobility but does not impact her cognitively. For instance, she has significant weakness in her hip, leg, and knee muscles, which affects her ability to balance herself while using a walker. The Student also has a diagnosis of attention deficit hyperactivity disorder (ADHD) and has a history of seizures.

During the 2009-2010 school year, the time period at issue in this complaint, the Student was six years old and attended kindergarten at the District's Ezra Eby Elementary School (the School). The District placed the Student in a general education classroom with special education supports pursuant to an Individualized Education Program (IEP). The supports included: one-to-one paraprofessional assistance, occupational therapy, physical therapy, speech language services, extended school year services, and resource program services. The ISD was responsible for serving the Student through the provision of and supervision over the special education services.

Due to the alleged disability discrimination, the Complainant did not return the Student to the District at the start of the 2010-2011 school year or since. Instead, the Complainant enrolled the Student in a virtual academy pending the outcome of this complaint. The Student currently is receiving education services through the virtual academy at the first- and second-grade level.

In May 2008, the Student's pediatrician wrote a prescription for a service animal for the Student. During the 2008-2009 school year, the Student's family engaged in fundraising activities in the School community to help secure funds to obtain the service animal, of which the District was aware. In March 2009, the Complainant notified the District that the family had raised the necessary funds and that the family intended to obtain a service animal that would accompany the Student throughout the school day during the 2009-2010 school year. At that time, the Complainant also requested a copy of the District's policies regarding service animals. The Complainant informed OCR that the Superintendent appeared supportive at that time and, although the principal raised some concerns about allergies and liability, it was her understanding that the District would permit the Student to have the service animal at school.

On October 12, 2009, the principal received a letter from the Complainant, informing him that the Student would be missing school to go to the 10-day training with her service animal and of the expectation that the service animal would attend school with the Student, requesting a copy of the District's policies regarding service animals, and requesting a meeting to discuss

transition of the service animal into the school setting. In October 2009, the Student attended, along with the Complainant, a 10-day intensive training at the service animal training facility where she obtained her service animal. Prior to that time, the service animal received 10 to 12 months of training at the facility, including training specific to the Student, based on a comprehensive application submitted by the Student, which included a video of the Student demonstrating her functioning in various settings and her individual needs.

The Complainant was trained as the service animal's handler, because the Student currently is not physically strong enough to handle the service animal on her own. The Student was responsible for commanding the service animal, and the handler physically managed the service animal, including caring for its physical needs. The service animal, the Student, and the Complainant took and passed a public access test and were certified as a team by the training facility. The service animal must be taken back to the training facility once each year to be retested and recertified. The Complainant indicated that, once the Student is able to handle the service animal on her own, she and the service animal can be recertified as a team of two. Based on Recipient records, OCR learned that the Complainant provided the Recipients with documentation of the service animal's training, including a list of tasks the service animal has been trained to perform for the Student, as well as the handler and service animal training certificates. In addition, the Complainant provided the District with letters from the Student's treating physicians supporting the Student's need for the service animal,

which stated that the service animal would increase the Student's independence, that the service animal should be permitted to assist the Student with mobility and transition, and that the service animal would assist the Student in developing more independent motor skills.

According to the Complainant, when the Student returned to school on October 23, 2009, after the training, the Complainant and the service animal dropped the Student off at her classroom. Upon returning home, the Complainant received a telephone call from the principal, who told her that the service animal could not accompany the Student to school, because the principal had received complaints that other students were fearful of the service animal and that the School needed to do more research before allowing the service animal to attend with the Student. The District does not dispute that, in October 2009, it told the Complainant that the service animal was not allowed to accompany and assist the Student at school and throughout the school day.

The Complainant stated that, in November 2009, she asked to be permitted to drop the Student off at her classroom with the service animal, asserting to the Recipients that, as the School is a public place, she had the right to do so. She stated that, starting in December 2009, the Recipients permitted her to drop the Student off at her classroom with the service animal on numerous occasions. According to the Complainant, during that time, the service animal assisted the Student with taking off her coat and, on at least one occasion, with retrieving her dropped lunchbox.

The Recipients scheduled a meeting with the Complainant, which was held on December 11, 2009. According to the Complainant, only administrators from the District and the ISD met with the family on that date. The Complainant shared the specific tasks the service animal was trained to do to assist the Student and the ways in which the service animal would allow the Student to access the educational environment with increasing independence while reducing the Student's reliance on a human aide. The Complainant stated that the Recipients claimed they needed documentation proving the dog was certified as a service animal. The Complainant stated that the Recipients told her they would take away the aide from the Student's IEP services if the Student brought the service animal to school. She also stated, and Recipient records revealed the Complainant documented in a letter to the Recipients, that the Recipients cited various reasons during the meeting for not allowing the service animal, including concerns that other students or faculty would have allergies; fear that other students or staff would have phobias related to service animals; concerns about the service animal having an accident in the building; and concerns that the service animal would be a distraction to other students. She stated that she was also told the Student did not need a service animal because she already had an aide. The Complainant asserts that she was told the service animal would not be permitted to attend school with the Student for these reasons.

The Recipients, on or around January 4, 2010, received a letter from another of the Student's treating physicians, stating that the Student's service animal assists the Student with mobility issues, with the goal

of increasing the Student's independent motor skills. The letter emphasized that the Student would continue to require an aide when using the service animal. The Recipients held another IEP meeting for the Student on January 7, 2010. Documentation submitted by the Recipients shows that, at the January 7 meeting, the IEP team considered whether the service animal would be permitted by examining whether the service animal was necessary to provide the Student with a free appropriate public education (FAPE). The IEP team considered the Student's ability to handle the service animal on her own, as well as the impact of the service animal on the learning environment. Specifically, the IEP team considered the following questions:

- What disability-related educational need is the service animal intended to address?
- Taking into account the educational plan currently in place for the Student, including the provision of an individual aide, will the service animal enhance or hinder the Student's ability to progress in the general curriculum?
- Is the Student currently capable of being responsible for the service animal?
- Given the age and maturity level of the Student and her classmates, can the distraction created by the service animal be accommodated without comprising the learning environment?

The IEP team concluded that the Student was being successful in school environment without the service animal, that all of her needs were being met by the program and services in place, and that adding the service animal would not be beneficial to the Student.

The IEP team also concluded that the Student was not entitled to utilize the service animal at school, because an adult aide was performing the tasks the service animal would perform for the Student. The Recipients therefore concluded that the Student was receiving a FAPE. The Complainant signed the IEP, noting her disagreement. At the January 7 meeting, the Complainant agreed to mediation to attempt to resolve issues relating to the service animal. The first mediation session occurred on January 29, 2010.

Based on Recipient records, OCR learned that, on March 18, 2010, the physical therapist and speech language pathologist that treat the Student outside of school submitted a letter to the Recipients, explaining how they incorporate the service animal into the therapies they provide the Student. Specifically, the therapists explained how the service animal had accompanied the Student to therapy since November of 2009 and had been incorporated into therapy in a number of ways. For example, the service animal assisted the Student with directional control of her walker, with ambulation, and with stabilizing herself while transitioning into and out of her walker from the floor. The Student used the service animal as a bridge for transitioning from her walker to a standing or seated position at a table. She also consistently used the service animal safely to improve her sitting balance by having the service animal provide posterior support as needed. The letter also described how the service animal was directed behind or to the side of the Student when she was standing at a supportive surface for improved safety. Additionally, the therapists explained that the Student used the service animal to safely pick up dropped items. The letter stated that,

although the Student still needed adult stand-by assistance for added safety, her independence with transitioning was improving.

The parties signed a mediation agreement on March 22, 2010. As a result of the mediated agreement, the District allowed the service animal to attend school, starting on April 12, 2010, for a 30-day trial basis, with limitations placed on: the settings in which the service animal could accompany the Student; the activities with which the service animal could assist the Student; and the proximity of the service animal and the handler to the Student, including requiring the service animal to sit in the back of the room away from the Student. The trial period did not begin until April 12, because the Recipients required an additional ten calendar days prior to the start of the 30-day trial period in order to notify other students' parents and staff about the service animal and to solicit concerns related to the service animal from them. The trial period was extended on May 21, 2010, to end on June 11, 2010, the last day of school.

According to a letter the Recipients' attorney submitted to OCR on November 5, 2010, as well as other documents submitted by the Recipients, the express purpose of the trial period was to allow them time to evaluate and further observe the service animal, as well as the third-party handler (i.e., the Complainant), in the school setting. During the trial period, records kept by District staff who observed the service animal during the trial period contain detailed notes of each time: the service animal required more than one command or attempt to complete a task, because the service animal did not successfully complete the task

on the first try; the handler read a book or magazine, took notes, typed on her cell phone, said anything to or responded to a staff person or another student, or left the room to take her other child to his classroom before the bell rang; the Student did not use the service animal when she could have used the service animal; or the Student made a face or seemed displeased when something the service animal retrieved for her had slobber on it. Based on Recipient records, OCR learned that, during the trial period, the Recipients prohibited the Student from participating in school-related activities such as a school play, "Relay for Life," and "field day" with the service animal. Recipient records revealed that the Recipients also prohibited the service animal from accompanying and assisting the Student during recess, lunch, computer lab, library activities, and other specials, and prohibited the service animal from assisting the Student during the provision of therapy services. Furthermore, according to letters, handwritten notes, and emails that the Recipients submitted to OCR, the Recipients forbade the use of the service animal for certain tasks that the service animal had been specifically trained to do, such as assisting the Student with toileting. In order for the Student to be allowed to use the service animal for toileting, the Recipients required that she demonstrate her use of the service animal while using the toilet, with the stall door open and four adults observing, which embarrassed her.

The School principal kept a handwritten log of parent and staff concerns expressed about the service animal, which the Recipients submitted to OCR along with emails received about the service animal. These showed that one teacher and two students were

reportedly allergic to dog dander, one teacher had a phobia about dogs, and one parent expressed concern about her child being in the presence of a dog, because the child had been attacked by a dog several years before. Four parents submitted concerns that the service animal might be a distraction to other students, although only two of the parents' children were in the same classroom as the Student.

The Recipients documented that the service animal barked on one occasion and growled on another occasion while at the School. The growling incident occurred just after school had ended and students were being released. The barking incident also occurred at the end of the school day. Based on Recipient records, OCR learned that the barking occurred when the service animal saw two boys roughhousing. The Complainant told OCR, and documentation submitted by the Recipients confirms, that she told the service animal to stop on each of those occasions and that he remained under her control.

According to letters Recipients submitted to OCR, including a letter, dated November 5, 2010, from the Recipients' attorney, the Recipients' position is that they are not required to permit the service animal to accompany and assist the Student, because they are meeting all of the Student's educational needs through the provision of an aide. They do not acknowledge the dog as a service animal; one articulated reason for this position at the time the OCR opened the complaint was that the Student could not handle the dog on her own. The Complainant contends that the service animal provides the Student with increased independence and that the Recipients' refusal to allow the service animal

to accompany and assist the Student at school denies the Student equal access to the Recipients' program by not allowing her to increase her independence and by forcing her to rely on an aide instead of decreasing her reliance on others.

During its investigation, OCR reviewed the District's policy with respect to service animals (the Policy) that was provided by the District. This policy is titled "Guidelines—Office of the Superintendent, Napoleon Community Schools," with the heading "Access to Equal Educational Opportunity." The guidelines are four pages long, and only one provision, under "Facilities," discusses "guide dogs." The Policy requires students seeking to utilize a guide dog to assist the student at school facilities, events, and programs to provide evidence of the dog's certification for that purpose. The Policy also states that proof of liability insurance must be provided if a dog is still in training.

OCR identified numerous compliance concerns with the Policy. For example, the District's policy does not contain a definition of "service animal" and, instead, uses the more limited term "guide dog." Additionally, the Policy requires a student seeking to use a service dog in the school environment to provide documentation of the dog's certification, whereas the Title II regulation explicitly states that public entities cannot require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Moreover, the Policy does not specify the permissible inquires that a public entity can make and the circumstance in which the public entity may not make inquiries, such as when it is readily apparent that an animal is trained to do work or perform tasks

for an individual with a disability. The Policy also does not specify the circumstances in which the service animal may be properly excluded, including the proper inquiries that must be made when the District believes a service animal presents a direct threat to others.

- **Applicable Legal Standards**

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, as well as Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department and by public entities, respectively. As recipients of such financial assistance and as public institutions, the Recipients are subject to these laws. Title II is not to be construed to provide a lesser standard than the standards applied under Section 504. The Title II regulation in effect at the beginning of the events at issue in this complaint has since been amended. The new Title II regulation took effect on March 15, 2011.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires a recipient school district to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. A FAPE is defined as th provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with disabilities as adequately as the needs of individuals without disabilities are met and which have been developed in accordance with process

requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). In conformance with Appendix A of the Section 504 implementing regulation, it is OCR's policy that, except in extraordinary circumstances, OCR does not review the results of individual placement decisions ro resolve disputes over the content of education plans, so long as the procedural requirements of the Section 504 regulation regarding identification, evaluation, placement, and procedural safeguards are met.

As a general rule, a school district's responsibilities to students with disabilities in the elementary and secondary setting may be satisfied through adherence to Section 504 FAPE procedures. However, there are situations in which a student with a disability may allege disability discrimination that is properly analyzed as a question of alleged different treatment, program exclusion, or failure to provide equal opportunity on the basis of disability under the Section 504 implementing regulation at 34 C.F.R. §§ 104.4(a) and (b) and the Title II implementing regulation at 28 C.F.R. §§ 35.130(a) and (b) and/or as a denial of a reasonable modification under Title II implementing regulation at 28 C.F.R. § 35.130(b)(7).

In some circumstances, Title II provides greater protections than Section 504 for persons with disabilities. Both the current Title II regulation and the former Title II regulation, which was in effect at the time of the Recipient's alleged non-compliance, prohibit recipient and public school districts from, on the basis of disability, excluding a qualified person with a disability from participating in, denying a student with

the benefits of, or otherwise subjecting a student to discrimination under any district program or activity. In addition, both the current and former Title II regulations require public entities to make reasonable modifications to policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.

Despite the lack of a specific provision in the former Title II regulation, the U.S. Department of Justice (DOJ) had taken the position that the ADA required schools, including those responsible for elementary and secondary education, to allow individuals with disabilities to be accompanied by service animals except for rare instances in which the animals' actual behavior poses a direct threat to the safety of others or results in a fundamental alteration of the nature of a program.

The current Title II regulation clarifies that public entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The regulation implementing Title III of the Americans with Disabilities Act of 1990 in effect at the same time of the former Title II regulation and therefore during the time at issue in this complaint defined "service animal" as any guide dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal

protection or rescue work, pulling a wheelchair, or fetching dropped items.

Under the former and the current Title II regulation, a public entity is required to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public; participants in services, programs, or activities; or invitees, as relevant, are allowed to go. In addition, a public entity is not permitted to ask about the nature or extent of a person's disability or require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. If it is not readily apparent that an animal is trained to do work or perform tasks for an individual with a disability, the public entity is permitted to make two inquiries to determine whether an animal qualifies as a service animal: 1) if the animal is required because of a disability; and 2) what work or task the animal has been trained to perform. Those inquiries would not be permitted if, for example, the dog is observed providing assistance with stability or balance to an individual with an observable mobility disability.

The current Title II regulation clarifies that an individual with a disability is not required to be the animal's handler in order to be covered by the rule's provisions.

A public entity may ask an individual with a disability to remove a service animal from the premises if the animal is out of control and the animal's handler does take effective action to control it, if the animal is not housebroken, or if the animal poses a direct thereat to the health and safety of others. The determination of

whether a service animal poses a direct threat must be based on an individualized assessment and reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Application of the Title II standard advances Congress's finding in enacting Title II that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living."

- **Analysis and Conclusion**

As a threshold matter, the evidence OCR obtained establishes that the Student has a disability and is entitled to the protections of these laws. The evidence also supports that the dog in question meets the definition of a "service animal" and that the Recipients had sufficient information to make that determination. The data submitted by the Recipients establishes that it was readily apparent that the animal was trained to do work or perform tasks for an individual with a disability. Therefore, the Recipients should have modified their policies and practices to permit the service animal to accompany and assist the Student through the school day, as no further inquiries were permissible. Instead, the Recipients held multiple meetings, did not acknowledge the dog was a service animal, and repeatedly stated that the Student's needs were being met by an aide. When the Recipients did permit the service animal to be brought onto District

facilities, they placed many restrictions on its use, in effect preventing the service animal from serving the Student.

In certain circumstances, limiting the ability of a student and the parent to choose the particular personal aid, such as mobility aids, would inappropriately inhibit the student's independence and result in discrimination. For example, a school district would violate the antidiscrimination requirements if it required a student who uses a wheelchair to be carried or it if required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane. The Recipients' assertions that the Student does not need her service animal for school, because they will provide her a human aide, similarly violate the antidiscrimination provisions of Section 504 and Title II.

In applying the Section 504 FAPE standard, the Recipients determined that the Student was not entitled to utilize the service animal at school, because all of the tasks the animal would perform for the Student were being performed by an adult aide; thus, the Recipients concluded that the Student was receiving a FAPE. A Section 504 FAPE analysis in this case, however, fails to take into account one of the fundamental purposes of Title II: to increase the independence of individuals with disabilities. In addition, as noted above, Section 504 includes provisions relating to equal opportunity that support providing the Student with the opportunity to access the District's programs as independently as possible. Moreover, the decision to deny the Student the service

animal in the school setting would have wider implications for the Student outside of the school day. Activities that the service animal performs for the Student during school, such as providing assistance with balance and support, retrieving dropped items, and taking off her coat, are the same type of activities for which the Student uses the service animal outside of the school.

In this case, contemporaneous documentary evidence demonstrates that the service animal became confused about whom to assist when the service animal and the handler were repeatedly made to sit in the back of the classroom away from the Student during the trial period. This evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a year, would result in a more prolonged and complete separation that would likely cause the Student's working relationship with the service animal to deteriorate.

Based on the foregoing, OCR has determined that the Recipients violated Section 504 and Title II by failing to modify their policies, practices, or procedures to permit the Student's service animal to accompany her to and assist her at school, thus denying and/or significantly limiting the Student's ability to access the District's programs and activities with as much independence as possible.

The Recipients do not admit any violation of Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act of 1990 with regard to the allegations in the complaint and do not agree with the legal conclusions or factual determinations

contained within this letter of findings. Notwithstanding their disagreement, the Recipients, in the interest of resolving this matter, voluntarily submitted the enclosed Resolution Agreement (the Agreement), which, when fully implemented, will resolve the identified compliance concerns relating to Section 504 and Title II and the Student's service animal. Specifically, the Agreement requires the Recipients to invite the Student to return to school at the District and to be accompanied and assisted by her service animal at school in all school-related activities; to convene a meeting of School administrators and all staff who will work with the Student and the Student's parents to create a plan for fully and effectively integrating the service animal into the school environment and using the service animal for all activities with which the service animal is trained to assist the Student, and to determine the services the School can provide to encourage and ensure the full and effective integration of the service animal into the school environment; to provide training to School staff and an assembly for students at the School on the role of service animals; and to revise and submit to OCR for review their policies and procedures with respect to service animals, and, once those policies are approved by OCR, to adopt the policies and procedures, publish them on its website, and notify, by effective means, students, parents, staff, and guardians of the policies and procedures as well as where a copy may be obtained.

- **Summary of Investigation to Date – Alleged Different Treatment Based on Disability**

The Complainant also alleged that, during the 2009-2010 school year, the District initially prohibited the Student from using playground equipment at the School, even though the Student was capable of using it and used it with her parents after school, and that the District later treated her differently from students without disabilities by requiring her to select only two activities before going outside for recess, while students without disabilities were not required to limit their choices in any way. Although the Letters of Notification issued by OCR in this case also included an allegation that the District playground equipment at the School was inaccessible, during the investigation, the Complainant clarified that she was not raising this as an allegation and that her allegation focused on the District's limiting the Student's use of the playground. The Complainant told OCR that she and her husband have allowed the Student to play on the playground equipment after school. She explained that, because of the Student's disability, the Student needed some assistance but that, with assistance, most of the playground equipment was usable by her.

According to the Recipients, the Student's special education aide was responsible for accompanying the Student during outdoor recess, including allowing the Student to play on playground equipment. The aide began keeping daily logs on April 12, 2010, at the start of the trial period for the service animal, through the end of the school year. OCR reviewed the aide's daily logs. The logs indicate that, prior to outdoor recess time, the Student was told to select two activities

during recess. In one log entry, dated April 15, 2010, the aide indicates that, when the Student asked about playing on the slide, the aide replied that there were too many kids out there (on the playground) and that it could be dangerous.

OCR reviewed summary notes of the Student's May 3, 2010, IEP review provided by the Recipients, in which the team is noted as having discussed playground opportunities for the Student. The notes indicate that the Student's parents wanted her to be able to participate on the playground slide and to choose the activity that she would like to participate in, although they preferred that she use the mileage track only once per day. The summary indicates that an extra aide could help to catch the Student when she was going down the slide, could provide the Student with options so that she could choose activities, and could check into modifying activities such as sidewalk chalk, bocce ball, and kickball so that the Student could participate. The IEP summary notes made no specific references to what activities would be appropriate for the Student to be involved in during recess. The only general reference to recess was listed under the "Adaptive/Independent Living Skills" section of the Student's IEP:

> She also requires adult assistance when using the restroom, dressing for outdoors, recess and moving between her walker and a chair as well as while in special classes (gym, music and art). [The Student]'s condition of Cerebral Palsy affects her balance, strength, and endurance and ability to complete all classroom activities both academic and social.

Prior to the completion of OCR's investigation of this allegation and any compliance findings, the Recipients indicated to OCR that they would like to resolve this allegation.

- **Applicable Legal Standards**

The regulations implementing Section 504 provides at 34 C.F.R. § 104.4(a) that no qualified person with a disability shall, on the basis of disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination by recipients of Federal financial assistance from the Department. Provision of different aids, benefits, or services in a recipient's programs and activities on the basis of disability is prohibited unless such action is necessary to provide the student with a disability with aids, benefits, or services that are as effective as that provided to others. 34 C.F.R. § 104.4(b)(1)(iv). Title II contains similar provisions at 28 C.F.R. §§ 35.103(a) and (b)(1)(iv).

- **Resolution**

As noted above, before OCR completed its investigation, the Recipients asked to resolve the playground issue voluntarily pursuant to Section 302 of OCR's Case Processing Manual, which provides that an allegation may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the allegation and signs a resolution agreement that addresses the complaint allegation. Such a request does not constitute an admission of liability on the part of the recipient institution, nor does it constitute a determination by OCR that the recipient institution has violated any of the laws that OCR enforces with

respect to that allegation. The provisions of the resolution agreement are to be aligned with the complaint allegation or information obtained during the investigation and consistent with applicable regulations.

As noted above, the Recipients have signed the enclosed resolution agreement, which, once implemented will fully address the complaint allegation related to recess. The agreement requires the Recipients to allow the Student to select her recess playground activities in the same manner as similarly situated students without disabilities and to be assisted by her service animal. The agreement also requires the District to notify all staff at the School who monitor the Student during recess, or who monitor recess activities generally, of these nondiscrimination requirements.

- **Conclusion**

This concludes our investigation of this matter. OCR will monitor the Recipients' implementation of the Agreement. If the Recipients do not fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure the Recipient's full compliance with Section 504 and Title II.

The letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. A complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

If you have any questions about this letter, please contact Ms. Karla K. Ussery, Team Leader, by telephone at (216) 522-4970 or by e-mail at Karla.Ussery@ed.gov. Please direct any communication about the Recipients' implementation of the Agreement to Ms. Vanessa Coterel, who will be monitoring the implementation. Ms. Coterel can be reached at (216) 522-4974 or Vanessa.Coterel@ed.gov. We look forward to receiving the Recipients' first monitoring report on or before May 31, 2012.

Sincerely,

/s/_____

Catherine D. Criswell
Director

Enclosure

Resolution Agreement
Napoleon Community Schools,
OCR Docket #15-10-1268
Jackson County Intermediate School District,
OCR Docket #15-10-1269

Napoleon Community Schools and Jackson County Intermediate School District (collectively, the Recipients) agree to enter into this Resolution Agreement for the purpose of amicably and expeditiously resolving OCR Docket #15-10-1268 and #15-10-1269 and ensuring compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, as amended during the course of this investigation. By entering into this Agreement, the Recipients do not admit any violation of Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act of 1990 with regard to allegations in the complaint. The Recipients do not agree with the legal conclusions or factual determinations contained within the accompanying letter of finding. Nothing contained in this Agreement shall be considered, construed, or used as an admission of liability, statutory or regulatory violation, or any other illegal act, by the Recipients. The Recipients agree to take the actions indicated below:

I. Individual Student

A. Service Animal

1. By May 31, 2012, the Recipients will invite the student at issue in this complaint (the

Student) to return to Ezra Eby Elementary School (the school) and notify her that, should she return, she will be provided the opportunity to have a service animal accompany and assist her throughout the school day, in all settings and activities within the school to the extent the service animal has been trained to assist her and to the greatest degree possible. In implementing this provision, the Recipients specifically acknowledge and agree to the following:

a. The Recipients will make reasonable modifications to their policies, practices, and procedures as necessary to permit the Student's use of her service animal to do work and perform tasks for the benefit of the Student as an individual with a disability, including tasks to increase the Student's independence, unless doing so would constitute a fundamental alteration of the District's service, program, or activity. In those circumstances where the Recipients believe that the proposed action would fundamentally alter the service, program, or activity, the Recipients have the burden of proving that compliance with Section 504 and Title II would result in such alteration. The decision that compliance would result in such alteration must be made by the head of the Recipients or his or her designee after considering all resources available for use

in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with Section 504 or Title II would result in such an alteration, the Recipients shall take any other action that would not result in such an alteration but would nevertheless ensure that, to the maximum extent possible, the Student, as an individual with a disability, receives the benefits or services provided by the Recipients. The Student will be permitted, in all settings, to be accompanied by and assisted in all activities that a service animal is trained to assist her with throughout the school day, with the limited exceptions discussed in paragraphs I.A (c)-(e) below.

b. The Recipients will fully integrate the Student and her service animal, including actively encouraging and utilizing all of the types of assistance the service animal has been trained to provide into each setting and activity, including both academic and nonacademic, in which the Student participates throughout the school day with students without disabilities.

c. Consistent with Title II's regulatory provisions governing the use of service animals, the Recipients will only exclude

the Student's service animal from their premises if (i) the service animal is out of control and the animal's handler does not take effective action to control it; or (ii) the service animal is not housebroken.

d. The Recipients will only limit the settings in which the Student is accompanied by a service animal, the activities with which she uses service animal, and the types of assistance a service animal provides during a particular activity where the Student's use of the service animal would pose a "direct threat." Pursuant to the Title II regulation at 28 C.F.R. § 35.104, a "direct threat" is defined as a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

e. In making any determination that the Student's use of a service animal would pose a direct threat to the health or safety of others in a particular setting or activity, the Recipients will make an individualized determination, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies,

practices or the provision of auxiliary aids or services will mitigate the risk, pursuant to 28 C.F.R. § 35.139.

f. The Recipients acknowledge their obligation to permit the Student equal access to their programs and activities under Section 504 and Title II through the use of a service animal and, therefore, will not prohibit a service animal from completing tasks for the Student or assisting the Student in completing an activity for the reason that a staff person is identified to complete that task or assist the Student with that activity for purposes of providing her with a free appropriate public education (FAPE) pursuant to the Student's Individualized Education Program (IEP).

g. The Recipients will not limit a service animal's or the handler's physical proximity to the Student, except as is provided by paragraphs I.A (c)-(e) above.

h. Except as provided by paragraphs I.A. (c)-(e) above, the Recipients will not limit the Student's activities or separate her from her peers because of her use of a service animal. For example, the Student will be permitted to participate, while accompanied and assisted by her service animal, in all field trips, extracurricular activities, and other school-sponsored events with her classmates to the maximum extent possible.

i. The Recipients may place reasonable limitations on the activities that the handler may engage in while in the classroom where the activities are unrelated to the handler's responsibilities regarding a service animal for the purpose of ensuring that the handler's activities do not create a disruption to the education environment. Napoleon Community Schools agrees to provide the handler with access to facilities, including an adult restroom and a place to take a break or eat lunch. The handler will be provided copies of and be expected to comply with the Recipients' established policies that apply in the school setting, including those that apply to fire drills and volunteers. In addition, the handler will submit to a criminal background check that is required of all personnel who regularly interact with children in the school setting.

j. The Recipients will not refuse the Student the services of an aide for the sole reason that the Student is accompanied by a service animal if aide services are required for the Student to receive a free appropriate public education under the Section 504 regulation at 34 C.F.R. § 104.33.

2. Should the Student reenroll, the Recipients will promptly convene a transition meeting of School administrators and all staff who will

be working with the Student and the Student's parents to ensure the Student's smooth transition back into the school. At that meeting, the group will determine how to fully integrate the Student's service dog into the educational environment, including in all settings and for all school activities in which the Student participates, including field trips and afterschool/extracurricular activities. The group will develop a plan to ensure the provision of support and services to fully and effectively integrate the service dog into the school environment and school activities, including how each staff person working directly with the Student, as well as school administrators, understand the requirement to and how to fully and meaningfully support the successful integration of the Student's service animal into all school activities and settings. The Student's IEP team also will meet to identify steps to ensure the Student's transition back to school and her receipt of a FAPE.

REPORTING REQUIREMENTS: By May 31, 2012, the Recipients will provide OCR with a copy of the notice and invitation issued to the Student's parents pursuant to Item I.A.1 above. Within 30 school days of the Student's reenrollment at the school, the Recipients will submit to OCR documentation to demonstrate their implementation of Items I.A.2 above, including: any documentation produced as a result of the meeting regarding the Student's reintegration into the school with a service animal; the date of the

meeting; the names and job titles of the participants; and a copy of the steps or plan developed to ensure the Student's reintegration at school with full use of a service animal and to address the requirements of I.A.1-I.A.2 above.

B. Playground

Napoleon Community Schools will ensure that the Student, regardless of her disability, is provided an equal opportunity to participate in activities on the playground in the same manner as is provided to students without disabilities, including being permitted to spontaneously pick activities on the playground after recess has commenced and to switch activities during recess as students without disabilities are permitted to do. In addition, the Student will be permitted to be accompanied and assisted by a service animal during outdoor recess and will be only limited in that regard for the reasons identified in paragraphs 1.A (c)-(e) above. Napoleon Community Schools will notify relevant staff of this requirement.

REPORTING REQUIREMENT: Within 30 school days of the Student's reenrollment at the school, Recipient Napoleon Community Schools will submit to OCR documentation to demonstrate its implementation of Item I.B above, including: the names and positions of all relevant staff notified that the Student must be permitted to spontaneously choose the activities she wishes to participate in during each recess and that she may be accompanied and assisted by a service animal during outdoor recess, the date that each person

was notified, the person who provided the notification, and verification that the Student is being provided an equal opportunity to participate in playground activities (verification of this last provision may be demonstrated by making relevant Recipient witnesses available for an OCR interview).

II. District-Wide Action

A. Training

1. By September 15, 2012, Napoleon Community Schools will provide training to the staff at the School by a person(s) knowledgeable about and who has experience training or working with service animals and a person knowledgeable about the requirements of Section 504 and Title II regarding service animals. The training will include a question-and-answer period.

2. Within 30 school days of the Student's reenrollment at Napoleon Community Schools, Napoleon Community Schools will provide an assembly to all students at the school about service animals. The assembly will include an age-appropriate discussion of the role of service animals and etiquette when students or staff come into contact with a person using a service animal.

REPORTING REQUIREMENTS: By September 15, 2012, Napoleon Community Schools will provide OCR with documentation to demonstrate its implementation of paragraph II.A.1 above including: the date(s) of the training provided; sign-

in sheets with the name and job title of each staff member who attended; the names, titles and qualifications of the individuals who conducted the training; and a copy of any materials used or distributed during the training and an outline of what was covered in the training if not self-evident from the materials. Within 30 school days of the Student's reenrollment at Napoleon Community Schools, Napoleon Community Schools will provide OCR with documentation to demonstrate its implementation of paragraph I.A.2 above including: the date of the assembly; a list of the classes of students who attended the assembly; the name and a brief description of the qualifications of the assembly presenter; and any materials used and distributed during the assembly.

B. Policies and Procedures

1. By May 31, 2012, the Recipients will each draft or revise and submit to OCR for review and approval their policies and procedures regarding the use of service animals by students with disabilities to ensure that the policies and procedures are consistent with Section 504 regulation at 34 C.F.R. § 104.4 and the Title II regulation at 28 C.F.R. §§ 35.104, 35.130, and 35.136.

2. Within 30 school days of receipt of the OCR-approved policies and procedures developed pursuant to Item II.B.2 above, each Recipient will: adopt the OCR-approved policies and procedures; publish them on their respective websites; notify parents and guardians of the policies and procedures and where a copy

may be obtained by a means that is designed to reach each parent and guardian; and notify staff of the revised policies and procedures by distributing a memorandum to staff or by including notice of them in a staff meeting or in-service training.

REPORTING REQUIREMENTS: By May 31, 2012, each Recipient will submit its revised or drafted policies and procedures pursuant to Item II.B.1 to OCR for review and approval. Within 30 school days of receipt of the OCR-approved policies and procedures, each Recipient will submit information documenting its implementation of Item II.B.2 above, including a link to the policies and procedures on each Recipient's website, copies of the written notification issued to parents and guardians, and an explanation as to how staff were notified of the revised policies and procedures.

GENERAL REQUIREMENTS

The Recipients understand that OCR will not close the monitoring of this agreement until OCR determines that the Recipients have fulfilled the terms of this agreement and are in compliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4 and 34 C.F.R. Part 104, Subpart D, and with Title II and its implementing regulation at 28 C.F.R. §§ 35.130 and 35.136, which are at issue in this case.

The Recipients understand that, by signing this agreement, they agree to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the Recipients understand that during the monitoring of

this agreement, if necessary, OCR may visit one or both Recipients, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether each Recipient has fulfilled the terms of this agreement and is in compliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4 and 34 C.F.R. Part 104, Subpart D, and with Title II and it implementing regulation at 28 C.F.R. §§ 35.130 and 35.136.

/s/_____ 4-26-12

Jim Graham, Superintendent
Napoleon Community Schools

Date

/s/_____ 4/25/12

Richard Rendell, Director of
Special Education Jackson ISD
Jackson County Intermediate
School District

Date

Supreme Court, U.S.
FILED
AUG 22 2016
OFFICE OF THE CLERK

No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' BRIEF ON THE MERITS

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

August 22, 2016

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.SC. § 1514(l), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the IDEA.,

PARTIES TO THE PROCEEDING

Petitioners Stacy Fry and Brent Fry, as next friends of minor E.F., were plaintiffs-appellants in the proceedings below

Respondents Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes, were defendants-appellees in the proceedings below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 788 F.3d 622. The opinion of the district court (Pet. App. 37-50) is reported at 2014 WL 106624.

JURISDICTION

The court of appeals entered judgment on June 12, 2015, and denied rehearing *en banc* on August 5, 2015. Pet. App. 53-54. The petition for *certiorari* was filed on October 15, 2015, and granted on June 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Rehabilitation Act of 1973, the Handicapped Children's Protection Act of 1986, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at Pet. App. 55-98.

STATEMENT OF THE CASE

This case involves a school district that refused to allow a girl with cerebral palsy to be accompanied by her service dog at school, in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The district barred the dog, it said, because its decision to provide one-on-one support from a human aide satisfied its obligations under a *different* statute—the Individuals with Disabilities Education Act (IDEA). When the girl and her parents sued to enforce their rights under the ADA and the Rehabilitation Act, the

school district said that the family should first have sought relief in administrative proceedings under the IDEA. In the Handicapped Children's Protection Act (HCPA), however, Congress specifically provided that the IDEA does not excuse school districts from complying with the ADA, the Rehabilitation Act, "or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). Congress required exhaustion of IDEA proceedings *only* when the "civil action" bought under one of those other statutes is "seeking relief that is also available under" the IDEA. *Id.* Even though the family did not contest the district's position that the school had complied with the IDEA, and even though the relief the family sought in its lawsuit—principally, damages—was not of a form that IDEA proceedings can provide, the lower courts agreed with the district and dismissed the suit. Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

A. The Statutory Framework

This case requires the Court to address the interplay between the IDEA and other federal statutes that protect children with disabilities. Congress specifically set the terms of that interaction in the HCPA.

1. The Individuals with Disabilities Education Act—The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, "requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009) (quoting 20

U.S.C. § 1412(a)(1)(A)). The statute defines a "free appropriate public education" as "special education and related services" that are provided at public expense, meet state standards, include an "appropriate" education, and "are provided in conformity with the individualized education program." 20 U.S.C. § 1401(9); see also 20 U.S.C. § 1414(d) (requiring an individualized education program (IEP) for each child with a disability). The statute defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). And it defines "related services" as supportive services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26).

This Court has declined to establish a comprehensive test for determining when a school has satisfied its obligations to provide a FAPE. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982) ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."); see also *Endrew F. v. Douglas County Sch. Dist. RE-1*, 136 S. Ct. 2405 (2016) (inviting the Solicitor General to file a brief in a case presenting that question). But it has made clear that the determination of whether a school district has provided a FAPE turns on the "educational benefit" received by the child. *Rowley*, 458 U.S. at 200-203. Thus, the IDEA may compel a school district to teach a student with a disability to use a service dog in some

contexts.[1] And the statute may require the district to allow the student to be accompanied by a service dog when doing so is "required to assist" the child "to benefit from special education." 20 U.S.C. § 1401(26).

The "procedural safeguards" mandated by the IDEA, 20 U.S.C. § 1412(a)(6), underscore the statute's focus on educational benefits. As relevant here, those safeguards require schools to provide "[a]n opportunity for any party to present a complaint" regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). If a parent presents a complaint, and the parties do not settle following mediation or a mandatory resolution session, see 20 U.S.C. § 1415(e), (f)(1)(B), the matter proceeds to "an impartial due process hearing" conducted by the state or local educational agency, 20 U.S.C. § 1415(f)(1)(A). The statute generally requires the hearing officer to make a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C.

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[1] See 34 C.F.R. § 300.34(c)(7)(ii)(B) ("related services" include "teaching children" to "use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision"), § 300.39(a)(2)(ii) ("special education" includes "travel training"), § 300.39(b)(4) ("travel training" means "providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them" to "[d]evelop an awareness of the environment in which they live" and "[l]earn the skills necessary to move effectively and safely from place to place within that environment").

§ 1415(f)(3)(E)(i). "In matters alleging a procedural violation," the statute provides that "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies" either "impeded the child's right to a free appropriate public education," "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education," or otherwise "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

Following the conclusion of the due process hearing, and any state administrative appeal, see 20 U.S.C. § 1415(g), a "party aggrieved" by the administrative decision may bring a civil action in state or federal court, 20 U.S.C. § 1415(i)(2)(A). In such an action, the court must "receive the records of the administrative proceedings," "hear additional evidence at the request of a party," and "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). These provisions authorize a broad array of relief for educational deprivations, including "reimbursement of the costs of private special-education services in appropriate circumstances." *Forest Grove Sch. Dist.*, 557 U.S. at 246. But the IDEA does not authorize the recovery of money damages. See *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that tuition reimbursement is available specifically because that remedy is restitutionary and does *not* constitute damages); see also *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009) (noting that the IDEA does "not allow for damages").

2. *The ADA and the Rehabilitation Act*—In contrast to the IDEA, the ADA and the Rehabilitation Act are antidiscrimination statutes that apply in and out of the school context. Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The statute requires that, to avoid discrimination, such a public entity must make "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Congress authorized the Department of Justice (DOJ) to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134.

Because of the importance of service animals to ensuring equal access for many people with disabilities, DOJ has interpreted the statute's "reasonable modifications" language to require that, with certain exceptions not applicable here, "a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability," and that "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g) (2011).[2] This rule applies to all state and local government entities, and

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[2] The service animal regulation reflects the Department's longstanding interpretation of Title II's reasonable modifications requirement. See Statement of Interest of United States at 4-5 & n.5, *Alboniga v. School Bd. of Broward County*, No. 0:14-CV-60085-BB (S.D. Fla., filed Jan. 26, 2015), available at http://www.ada.gov/briefs/broward county_school_board_soi.pdf.

it does not require a showing of a particular *educational* need before an individual may invoke its protections. See 42 U.S.C. § 12131(1)(B) ("public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government"); *Lane*, 541 U.S. at 530 (noting that "Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks").

Unlike the IDEA, ADA Title II provides for a judicial remedy in the first instance. As this Court has explained, "Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U. S. C. § 794a, which authorizes private citizens to bring suits for money damages." *Lane*, 541 U.S. at 517 See 42 U.S.C. § 12133 (incorporating Rehabilitation Act's remedial provisions). Individuals who have experienced discrimination may choose instead to file a complaint with DOJ or another federal agency designated to address ADA complaints, including the Department of Education's Office for Civil Rights (OCR). See 28 C.F.R. §§ 35.170, 35.171, 35.190. But there is no requirement that they do so before proceeding to court. See 28 C.F.R. § 35.172(d); see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 n.41 (1979) (rejecting exhaustion requirement under Title VI of the Civil Rights Act, whose remedies were incorporated by reference in the Rehabilitation Act, 29 U.S.C. § 794a(a)(2)); *Fitzgerald*, 555 U.S. at 255 (Title IX of the Education Amendments, which also incorporates Title VI's remedies, "has no administrative exhaustion requirement").

Section 504 of the Rehabilitation Act prohibits any entity "receiving Federal financial assistance" from discriminating against an "otherwise qualified individual with a disability" 29 U.S.C. § 794(a). As the overlap in the text indicates, Section 504 applies essentially the same substantive standards as ADA Title II. The Department of Education's Section 504 regulations provide that the failure to provide a free appropriate public education is *one way* a school can violate Section 504. See 34 C.F.R. § 104.33. But those regulations also incorporate general nondiscrimination prohibitions, like those in the ADA, that apply even when a school has provided a free appropriate public education. See 34 C.F.R. § 104.4. And because Title II specifically incorporated Section 504's remedial section, the relief available under the two statutes is identical. See 29 U.S.C. § 794a; 42 U.S.C § 12133. Thus, just as under the ADA, an individual who has experienced discrimination under Section 504 may file an administrative complaint with OCR, or that individual may proceed directly to court to sue for damages.

3. The Handicapped Children's Protection Act—In 1984, this Court addressed the interaction between the IDEA (then called the Education for All Handicapped Children Act and commonly abbreviated "EHA") and other statutes that protect the rights of children with disabilities. In *Smith v. Robinson*, 468 U.S. 992, 1009-1021 (1984), the Court held that the EHA provided "the exclusive avenue" for students with disabilities "to assert an equal protection claim to a publicly financed special education"—even if that claim arose under some other federal statute or the Constitution itself.

See *id.* at 1012-1013. Applying that rule, the Court concluded that the *Smith* plaintiff's Section 1983 and Section 504 claims were foreclosed by the EHA. See *id.* at 1009-1021.

Two years after *Smith*, Congress adopted the Handicapped Children's Protection Act to "reaffirm[] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with EHA as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 6 (1985). In service of that goal, the HCPA amended the IDEA specifically to preserve educational-rights claims under the Constitution and other federal laws. In its current form, the relevant section of the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws **seeking relief that is also available under this subchapter**, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). This provision expressly preserves non-IDEA claims for the educational rights of children with disabilities, but it requires that, where a plaintiff "seek[s] relief that is

also available under" the IDEA, that plaintiff must first exhaust state administrative remedies under that statute.

B. The Facts

1. Respondents' Refusal to Permit E.F to Use Her Service Dog at School—Petitioner E.F. was born with cerebral palsy. BIO App. 1.[3] Her condition "significantly limits her motor skills and mobility," but it imposes no cognitive impairment. *Id.* at 1-2. In 2009, when she was five years old, E.F obtained a service dog prescribed by her pediatrician "to help her live as independently as possible." *Id.* at 2. The dog, named "Wonder," is a Goldendoodle—a breed with "a no-shedding or low-shedding coat" that is "generally tolerable to people with allergies to dogs." *Id.* at 7. With the help of fundraisers held by community members, E.F and her family were able to afford the "approximately $13,000" price tag to pay for Wonder's training. *Id.* at 6-7. Wonder was certified and trained to assist E.F "in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet." *Id.* at 7.

Respondents Napoleon Community Schools and Jackson County Intermediate School District (collectively, the School District) refused to permit E.F.

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[3] Because the lower courts dismissed this case on the pleadings, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

to attend school with her service dog. *Id.* at 2. The School District reasoned that E.F 's IEP already required that a human aide give E.F one-on-one support, and "Wonder would not be able to provide any support the human aide could not provide." Pet. App. 4. See also BIO App. 8 ("The IEP states that [E.F 's] parents 'requested a service dog for their daughter to enhance her independence' and that the request was denied as [E.F 's] 'physical and academic needs are being met through the services/programs/ accommodations of the IEP '"). Because "an adult aide was performing the tasks the service animal would perform for the Student," Respondents "concluded that [E.F.] was receiving a FAPE" and refused to allow Wonder to come to school. J.A. 25.

As a result of that decision, E.F was forced to attend school without Wonder from October 2009 to April 2010. BIO App. 2. After her *pro bono* attorneys met with the School District's counsel, the parties began mediation. J.A. 25-26. Following that mediation, E.F was permitted to bring the dog to school "for a 30-day 'trial period' that began on April 12, 2010 and was extended through the end of the school year." BIO App. 8. But Respondents "refused to allow [E.F.] to use Wonder as a service dog during this trial period; rather, the dog was required to remain in the back of the room during classes, and was forbidden from assisting [E.F.] with many tasks he had been specifically trained to do." *Id.* Respondents also "refused to allow Wonder to accompany and assist [E.F.] during recess, lunch, computer lab, and library," and they did not allow Wonder to attend major activities such as field day and the school play *Id.* at 8-9. As the OCR later found, these limitations "in

effect prevent[ed] the service animal from serving the Student." J.A. 35.

Notably, Respondents at times refused to allow Wonder to assist E.F. with going to the toilet, thus requiring her to rely on human assistance in such an intimate and private act. J.A. 27 The Office for Civil Rights found that "[i]n order for [E.F.] to be allowed to use the service animal for toileting, the [Respondents] required that she demonstrate her use of the service animal while using the toilet, with the stall door open and four adults observing, which embarrassed her." *Id.*

After the trial period, Respondents refused to permit Wonder to accompany E.F to school at all. BIO App. 3, 9. As a result, the Fry family removed E.F from Respondents' school and homeschooled her using an online cybercharter curriculum for the next two years. Pet. App. 4; BIO App. 9.

2. The Fry Family's Pursuit of Relief Under the ADA and the Rehabilitation Act—In July 2010, the Fry family filed a complaint with OCR. J.A. 16. They alleged that the School District had violated the ADA and the Rehabilitation Act by refusing to permit E.F to use her service dog at school. *Id.* at 16-17. OCR investigated the complaint, and in May 2012 it issued a 14-page decision, which concluded that the School District had violated Title II of the ADA and Section 504 of the Rehabilitation Act. *Id.* at 18-19, 35-36.

In the OCR proceedings, Respondents took the position "that they are not required to permit the service animal to accompany and assis. the Student, because they are meeting all of the Student's *educational* needs through the provision of an aide."

Id. at 28 (emphasis added). Thus, the School District maintained, E.F "was receiving a FAPE" even without being allowed to use her dog. *Id.* at 35. But OCR observed that a school's obligations to a child with disabilities under the ADA and Section 504 extend beyond simply providing a free appropriate public education. See *id.* at 31-33. In particular, the agency noted that the ADA requires a public entity "to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public; participants in services, programs, or activities; or invitees, as relevant, are allowed to go." *Id.* at 33.

Because E.F. relied on the service-animal and related nondiscrimination obligations under the ADA and Section 504, OCR determined that a "FAPE analysis" was inappropriate. *Id.* at 35. OCR found that even if the School District's refusal to permit Wonder to accompany E.F did not cause her any *educational* harm, that refusal limited her independence by requiring her to rely on human assistance to perform tasks at school. OCR noted that "a school district would violate the antidiscrimination requirements if it required a student who used a wheelchair to be carried or if it required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane." *Id.* The agency concluded that Respondents' "assertions that the Student does not need her service animal for school, because they will provide her a human aide, similarly violate the antidiscrimination provisions of Section 504 and Title II." *Id.*

Despite OCR's findings, the School District continued to deny liability, and did not provide any backward-looking relief. J.A. 36-37 But it did "agree[] to permit [E.F.] to attend school with Wonder starting in fall 2012." Pet. App. 4. Petitioner Brent Fry, E.F.'s father, then reached out to Respondent Barnes, the Principal of Ezra Eby Elementary, to discuss E.F.'s return to school. BIO App. 10. Based on that discussion, E.F.'s parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." *Id.* The Fry family thus decided to remove E.F. from Respondents' schools permanently and "found a public school in Washtenaw County"—a neighboring jurisdiction—"where the principal and staff enthusiastically welcomed [E.F.] and Wonder and saw their presence as an opportunity to promote the inclusion of students with disabilities within the school." *Id.* at 10-11. E.F. continues to attend the Washtenaw County public schools, see *id.* at 11, and the Fry family now lives in Washtenaw County as well.

In December 2012, E.F., by and though her parents as next friends, filed this suit "seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012." Pet. App. 4-5. The lawsuit claimed that the School District's actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, and it sought damages for the social and emotional harm those actions caused E.F., as well as declaratory relief and attorneys' fees. BIO App. 11-12.[4]

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[4] The lawsuit also included a state-law claim, BIO App. 19-21, but the district court declined to exercise supplemental jurisdiction over that claim. See Pet. App. 5.

The district court dismissed the suit for failure to exhaust state administrative remedies under the IDEA. Pet. App. 37 A divided panel of the Sixth Circuit affirmed. Pet. App. 1. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But despite the HCPA's text, which limits exhaustion to cases "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the majority held that "this does not in itself excuse the exhaustion requirement," because otherwise plaintiffs could "evade" that requirement "simply by appending a claim for damages." Pet. App. 17 (internal quotation marks omitted). The panel held that exhaustion is required "when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6. Because it concluded that the "core harms" alleged by E.F "relate to the specific educational purpose of the IDEA," and that she "could have used IDEA procedures to remedy these harms," the panel concluded that the complaint was properly dismissed for failure to exhaust. *Id.*

Judge Daughtrey dissented. Pet. App. 21. She specifically noted a conflict between the majority's decision and the Ninth Circuit's decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-875 (9th Cir 2011) (*en banc*), cert. denied, 132 S. Ct. 1540 (2012), which "held [that] '[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" Pet. App. 28 (quoting *Payne*, 653 F.3d at 871 (emphasis in Judge Daughtrey's dissent)).

The court denied *en banc* review, though Judge Daughtrey stated that she would have granted rehearing. Pet. App. 53-54.

SUMMARY OF ARGUMENT

A. The interpretation adopted by the Sixth Circuit, which Respondents ask this Court to adopt, cannot be squared with the text of the HCPA. This Court has repeatedly emphasized, most recently in *Ross v. Blake*, 136 S. Ct. 1850 (2016), that statutory exhaustion provisions must be rigorously applied according to their text. Thus, the Court has explained, courts may not rewrite those provisions to impose extra-statutory exceptions to exhaustion, nor may they impose extra-statutory limitations on a plaintiff's right to proceed directly to court.

The HCPA requires exhaustion only for a "civil action" that is "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). By its plain terms, that text requires exhaustion only when a plaintiff who has filed a non-IDEA claim actively demands a form of relief that the IDEA actually empowers its administrative proceedings to provide. The IDEA empowers administrative hearing officers to provide relief only to redress deprivations of educational benefits, relief that Petitioners do not seek, and it does not authorize them to provide damages, relief that Petitioners do seek. By hypothesizing about the relief Petitioners "could have" sought, rather than looking to what their "civil action" was actually "seeking," the Sixth Circuit disregarded the plain statutory text.

B. The HCPA's text reaffirms the presumptive rule of administrative law that exhaustion is not required where administrative proceedings cannot provide the relief the plaintiff seeks. This Court has recognized certain well-established exceptions to the exhaustion requirement. One of these exceptions excuses exhaustion when it would prove futile, and the Court has confirmed that the futility exception applies under the IDEA. See *Honig v. Doe*, 484 U.S. 305, 327 (1988). In the absence of contrary statutory text, the Court has repeatedly applied the futility exception to excuse exhaustion when administrative proceedings cannot provide the relief the plaintiff specifically requested in his or her complaint. See *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Greene v. United States*, 376 U.S. 149 (1964). Congress is free to depart from these holdings—as it did, for example, in the Prison Litigation Reform Act (PLRA). But the HCPA's text, by requiring exhaustion only when a plaintiff's "civil action" is "seeking relief that is also available under" the IDEA, makes clear that Congress reaffirmed the background futility principle here. The HCPA's legislative history confirms that conclusion. So does the statute's purpose—to overturn this Court's *Smith* decision and make clear that claims brought under the Constitution and other federal statutes protecting the rights of children with disabilities could proceed to court independently.

C. Applying the HCPA according to its plain terms will protect disabled children and their parents from burdensome and time-consuming delays in vindicating their rights. Although the Department of Education's regulations set what looks like a brisk timeline for IDEA administrative proceedings, the reality is very

different. In cases in which administrative proceedings can provide disabled children and their parents the relief they seek, requiring a first resort to those proceedings advances the interest in giving local officials the opportunity to set educational policy in the first instance while also giving children and parents robust procedural protections. But where the administrative proceedings cannot provide the relief children and parents seek, requiring exhaustion merely delays the vindication of rights protected by other statutes. Congress was fully entitled to conclude that this burden would outweigh the marginal benefit that administrative proceedings would have by narrowing disputes and creating factual records in those cases in which the proceedings could not grant the relief plaintiffs seek.

D. Because Petitioners' lawsuit did not seek relief available under the IDEA, the Sixth Circuit erred in requiring exhaustion. Petitioners brought this case under the ADA and the Rehabilitation Act, not the IDEA. Respondents have consistently maintained that, because E.F could learn just as well with a human aide as she could when accompanied by Wonder, the school did not violate the IDEA. Petitioners have not contested that conclusion. Rather, Petitioners argue that the refusal to allow E.F. to be accompanied by her service dog deprived her of independence at school, including in such intimate activities as going to the bathroom. Petitioners seek damages for the resulting emotional harm, as well as a declaration that Respondents violated E.F 's rights under the ADA and Rehabilitation Act and attorneys' fees for vindicating those rights. Not one of these three forms of relief is available under the IDEA, and Petitioners do not allege

any educational deprivation of the sort that is redressable in IDEA proceedings in any event. Accordingly, by the plain terms of the HCPA, the Sixth Circuit should not have required exhaustion.

ARGUMENT

THE SIXTH CIRCUIT ERRED BY AFFIRMING THE DISMISSAL OF THIS CASE FOR FAILURE TO EXHAUST

From the outset of this dispute, Respondents took the position that their refusal to permit Wonder to act as a service dog did not deprive E.F of educational benefits in violation of the IDEA. Petitioners do not contest that conclusion. Rather, Petitioners' position is, and has always been, that even if the use of a human aide allowed E.F to experience sufficient *educational* benefits to satisfy the IDEA, the refusal to admit Wonder denied E.F. independence at school and constituted discrimination at a public facility in violation of the ADA and the Rehabilitation Act. When the Fry family filed suit to enforce E.F 's rights under the ADA and Rehabilitation Act, however, the School District insisted that the family first file an administrative complaint under the IDEA—even though both parties *agree* that the School District did not violate the IDEA, and even though IDEA proceedings *cannot* provide the relief the Fry family seeks in its ADA and Rehabilitation Act suit. Respondents' position cannot be squared with the text of the HCPA. That text makes clear that the ADA and Rehabilitation Act create causes of action that are independent from the IDEA—indeed the entire purpose of the HCPA was to reaffirm the independence of such statutes—and that ADA and Rehabilitation Act

plaintiffs need not exhaust administrative proceedings under the IDEA unless their "civil action" is one "seeking relief that is also available" in those administrative proceedings. 20 U.S.C. § 1415(*l*). Because the Sixth Circuit disregarded the HCPA's plain text, its judgment should be reversed.

A. The HCPA's Text Makes Clear That Exhaustion of IDEA Remedies is Required Only Where Plaintiffs Who Bring Non-IDEA Claims Actually Seek Relief That is Also Available in IDEA Proceedings

1. The Text Requires Exhaustion Only When the Plaintiff Actively Requests a Form of Relief that IDEA Proceedings Can in Fact Provide

This Court "always say[s]" that statutory interpretation "begins with the text." *Ross*, 136 S. Ct. at 1857. That is especially true when interpreting statutory provisions requiring exhaustion of administrative remedies. Under such provisions, "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* "Time and again, this Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Id.*

The Court has made clear that adherence to the text "runs both ways: The same principle applies regardless of whether it benefits the [plaintiff] or the [defendant]." *Id.* at 1857 n.1. The Court has thus "overturned judicial rulings that imposed extra-statutory limitations on a [plaintiff's] capacity to sue." *Id.* In *Jones v. Bock*, 549 U.S. 199, 203 (2007), for example, the Court reversed lower-court decisions under the Prison Litigation Reform Act (PLRA) "that required an

inmate to demonstrate exhaustion in his complaint, permitted suit against only defendants named in the administrative grievance, and dismissed an entire action because of a single unexhausted claim." *Ross*, 136 S. Ct. at 1857 n.1 (describing *Jones*). "'[T]hese rules,' [the Court] explained, 'are not required by the PLRA,' and 'crafting and imposing them exceeds the proper limits on the judicial role.'" *Id.* (quoting *Jones*, 549 U.S. at 203). And in *Ross* itself, the Court remanded to require the Fourth Circuit to enforce the limitation on the PLRA's exhaustion mandate that is "baked into its text: An inmate need exhaust only such administrative remedies as are 'available.'" *Id.* at 1862 (quoting 42 U.S.C. § 1997e(a)).

These holdings apply fundamental legal principles. Because Congress created federal statutory causes of action, and gave the federal courts jurisdiction to hear cases arising under its statutes, this Court has long recognized that "'a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [congressional] intent.'" *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 580 (1989) (quoting *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501-502 (1982)). Congressional intent is best determined by the statutory text. See *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal quotation marks omitted). When it comes to actions enforcing federal civil rights in particular, the Court has recognized that, absent clear statutory text requiring exhaustion of administrative remedies, such actions "*belong in court*," "exist independent of any

other legal or administrative relief that may be available as a matter of federal or state law," and "are judicially enforceable *in the first instance*." *Felder v. Casey*, 487 U.S. 131, 148 (1988) (internal quotation marks omitted; emphasis in original).

By its plain text, the HCPA requires exhaustion only when a plaintiff who has filed a non-IDEA claim affirmatively demands a form of relief that the IDEA actually empowers its administrative proceedings to provide. The relevant provision of the HCPA does two things: First, it expressly preserves non-IDEA claims "under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). Second, it provides that "before the filing of a civil action under such laws *seeking relief that is also available* under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." *Id.* (emphasis added).

The two crucial terms in that text are "seeking relief" and "also available." One cannot "seek" a form of relief unless one actively asks for it.[5] And, as this

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[5] See Webster's Ninth New Collegiate Dictionary (1984) (definitions of "seek" include: "[t]o go in search of; look for"; "[t]o ask for: request"; "[t]o try to acquire or gain: aim at"); American Heritage Dictionary of the English Language (William Morris ed., 1981) (definitions of "seek" include: "[t]o endeavor to obtain or reach"; "[t]o inquire for; request"); Webster's Third New International Dictionary of the English Language, Unabridged (Philip Babcock Gove ed. 1968) (definitions of "seek" include: "[t]o go in search of; look for; search for"; "[t]o inquire for; ask for;

Court's decisions interpreting the PLRA's exhaustion provision have made clear, relief is not "available" in administrative proceedings unless those proceedings are actually, and not merely hypothetically, capable of providing it. The Court has explained that "the ordinary meaning of the word 'available' is '"capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'"" *Ross*, 136 S. Ct. at 1858 (quoting *Booth v. Churner*, 532 U.S. 731, 737-738 (2001) (itself quoting Webster's Third New International Dictionary (1993))). When "an administrative remedy, although officially on the books, is not capable of use to obtain relief," it is not an "available" remedy. *Ross*, 136 S. Ct. at 1859.

By limiting exhaustion to "civil actions . seeking relief that is also available" under the IDEA, the HCPA thus "contains its own, textual exception to mandatory exhaustion." Cf. *Ross*, 136 S. Ct. at 1858 (discussing the PLRA). In particular, the HCPA's text makes clear that exhaustion of non-IDEA claims is not required unless the plaintiff's complaint (which defines the

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entreat; request"; "[t]o try to acquire or gain; aim at"); Oxford English Dictionary (James A.H. Murray et al. eds., 1961) (definitions of "seek" include: "to go in search or quest of; to try to find, look for"; "[t]o try to obtain (something advantageous); to try to bring about or effect (an action, condition, opportunity, or the like)"; "[t]o ask for, demand, request (*from* a person)"); Webster's New International Dictionary of the English Language (William Allan Neilson et al. eds., 2d ed. 1958) (definitions of "seek" include: "[t]o inquire for, to ask for; request"; "[t]o try to acquire or gain; to strive after as an aim"); Webster's New World Dictionary of the American Language (Encyclopedic ed. 1951) (definitions of "seek" include: "[t]o try to find; search for; look for"; "[t]o ask or inquire for"; "[t]o try to get or acquire; aim at; pursue").

scope of the "civil action") actually requests (is "seeking") relief that the IDEA actually empowers hearing officers to provide (is "available under this subchapter"). The IDEA authorizes hearing officers to grant relief only if the alleged violation deprived the child of educational benefits. See 20 U.S.C. § 1415(f)(3)(E); pp. 4-5, *supra*. And the IDEA does not empower hearing officers to award money damages. See p. 5, supra; BIO 6, 20 (conceding that "the IDEA does not allow for an award of general money damages"). As Judge Bybee explained for the *en banc* Ninth Circuit, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (*en banc*) (emphasis in original), cert. denied, 132 S. Ct. 1540 (2012). See also *Moore v. Kansas City Pub. Sch.*, 2016 WL 3629086, at *4 (8th Cir. July 7, 2016) (agreeing with *Payne*).

2. By Hypothesizing About the Relief Petitioners "Could Have" Sought, Rather Than the Relief the Complaint Actually Sought, the Sixth Circuit Disregarded the Statutory Text

Rather than looking to the relief the Fry family actually sought in their ADA and Rehabilitation Act lawsuit, the Sixth Circuit panel majority held that exhaustion was required because the family "could have" sought *different* relief in the IDEA process. Pet. App. 15. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But it made no effort to confront—much less reconcile its decision with—the

HCPA's "seeking relief that is also available" language. Instead, it referred to "clear policy justifications" for requiring exhaustion (Pet. App. 8), concluded that "this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action" (Pet. App. 9), and suggested that refusing to require exhaustion for claims that sought money damages would allow plaintiffs to "evade the exhaustion requirement" (Pet. App. 17). "Accordingly," the panel majority said, "it makes sense to require IDEA exhaustion in order to preserve the primacy the IDEA gives to the expertise of state and local agencies." Pet. App. 9-10.

The Sixth Circuit erred in both its premise and its conclusion. First, the court's policy-based concern about allowing parents to evade exhaustion of IDEA claims simply by seeking damages has no application where the plaintiffs seek damages, not for the denial of a free appropriate public education, but for distinct and independent violations of Section 504 and the ADA. As we show in Section D, *infra*, this case does not involve the denial of a FAPE. Second, as we show in Section C, *infra*, the panel majority ignored important policy concerns that cut against its holding. Third, and most important, the policy balance was one for Congress to strike—not one to be decided based on what "makes sense" to judges.

As this Court explained just last Term, courts have a degree of policy freedom when applying "judge-made exhaustion doctrines." *Ross*, 136 S. Ct. at 1857. "But a statutory exhaustion provision stands on a different footing." *Id.* Where, as here, Congress has delimited

the scope of exhaustion, it has "foreclos[ed] judicial discretion." *Id.* When a court applies "not a judge-made doctrine but a statutory requirement," it "must honor Congress's choice." *Id.* (internal quotation marks omitted). Expanding *or* contracting the scope of an exhaustion requirement mandated by Congress "exceeds the proper limits on the judicial role." *Jones*, 549 U.S. at 203. The Sixth Circuit panel majority ignored that principle when it held that the HCPA, which by its terms demands exhaustion only for an action "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), required exhaustion even for actions that do not seek any such relief.

Defending the Sixth Circuit's decision, Respondents argue that reading the HCPA according to its terms "privileges form over substance." Resp. Supp. Br. 6. "The better view," they assert, "is that '[t]he nature of the claim and the governing law determine the relief no matter what the plaintiff demands.'" *Id.* (quoting *Charlie F v. Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 992 (7th Cir. 1996)). They rely on this Court's statement in a recent ERISA decision that "whether the remedy a plaintiff seeks is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) (internal quotation marks and alterations omitted); see Resp. Supp. Br. 6-7. But this Court's decision in *Montanile*, far from supporting Respondents, cuts decisively against them. Here, the *claim* that Petitioners are asserting does not arise under the IDEA, and does not seek the FAPE that the IDEA was designed to ensure. Moreover, the *Montainile* Court

specifically held that even if the underlying basis for a *claim* was equitable, the plaintiff could not proceed under the relevant ERISA provision if the *remedy* sought was a legal one. See *Montanile*, 136 S. Ct. at 658. That, of course, is the situation here, where Petitioners seek a damages remedy that the IDEA does not authorize. And, in sharp contrast to the Sixth Circuit's reliance on policy concerns, the *Montanile* Court rejected the plaintiff's argument that allowing a suit would serve "ERISA's objectives"; it instead insisted that "'[v]ague notions of a statute's "basic purpose" are inadequate to overcome the words of its text regarding the *specific* issue under consideration.'" *Id.* at 661 (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993)) (emphasis in original).

The HCPA's text is clear. Exhaustion is required only if a plaintiff is "seeking relief that is also available under" the IDEA procedures. 20 U.S.C. § 1415(*l*). But Respondents and the Sixth Circuit "read[] the word 'seeking' out of the statute, transmuting it into something like 'even if not seeking.'" Mark C. Weber, Special Education Law and Litigation Treatise § 21.8 at 21:99 n.266 (3d ed. 2008). This Court has made clear that courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted); see also *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1132 (2015) (applying rule against surplusage); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1357 (2015) (Alito, J., concurring in the judgment) (same). The Sixth Circuit's disregard of the statutory text warrants reversal.

B. The HCPA Reaffirms the Presumptive Rule of Administrative Law That Exhaustion is Not Required Where Administrative Proceedings Cannot Provide the Relief the Plaintiff Seeks

1. The HCPA's Text Codifies an Aspect of the Well-Established Futility Exception

By making clear that exhaustion of non-IDEA claims is not required unless plaintiffs "seek[] relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the HCPA reaffirmed basic administrative law principles. Cf. *Ross*, 136 S. Ct. at 1863 (Breyer, J., concurring in part) (arguing that a statutory exhaustion regime presumptively "include[s] administrative law's 'well-established exceptions to exhaustion'") (quoting *Woodford v. Ngo*, 548 U.S. 81, 103 (2006) (Breyer, J., concurring in the judgment). A well-established exception to the exhaustion requirement exists "when exhaustion would prove 'futile.'" *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). The text of the HCPA itself contemplates that the IDEA's exhaustion requirement contains exceptions, by requiring administrative proceedings to be exhausted only "to the same extent as would be required had the action been brought under this subchapter " 20 U.S.C. § 1415(*l*). Two years after Congress enacted the HCPA, this Court confirmed that the futility exception applies under the IDEA, so that "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 327 (1988).

In the absence of statutory text to the contrary, this Court has repeatedly applied the futility exception to excuse exhaustion when the administrative process

cannot provide the relief the plaintiff seeks in court. In *McCarthy v. Madigan*, 503 U.S. 140 (1992), for example, a federal prisoner filed suit to challenge unconstitutional prison conditions without first exhausting the Bureau of Prisons' administrative grievance process. "On the first page of his complaint, [the plaintiff] wrote: 'This Complaint seeks Money Damages Only.'" *McCarthy*, 503 U.S. at 142. The Court held that a federal prisoner "seeking only money damages" need not exhaust the grievance process before filing suit in federal court. *McCarthy*, 503 U.S. at 152. The Court's opinion concluded that the administrative remedy was futile based on two factors: first, the "short, successive filing deadlines" in the administrative process; and, second, that "the administrative 'remedy' does not authorize an award of monetary damages—the only relief requested by McCarthy in this action." *McCarthy*, 503 U.S. at 152. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred in the judgment. He agreed that exhaustion was not required, but his conclusion was "based entirely on the fact that the grievance procedure at issue does not provide for any award of monetary damages." *Id.* at 156 (Rehnquist, C.J., concurring in the judgment). Because that procedure would therefore be ineffective "in cases such as this one where prisoners seek monetary relief," Chief Justice Rehnquist found it "improper to impose an exhaustion requirement." *Id.*[6]

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[6] *Congress overturned McCarthy*'s holding as to prisoner suits in the PLRA, 42 U.S.C. § 1997e(a). But Congress did not alter the basic administrative law principles on which *McCarthy* relied. As we show *infra*, the text of the HCPA is decisively different than that of the PLRA.

The Court applied the same principles in *Greene v. United States*, 376 U.S. 149 (1964). There, the plaintiff filed a suit seeking restitution for the improper cancellation of his security clearance in 1953; the government argued that he should have exhausted proceedings under a 1960 regulation that provided administrative remedies for the denial of security clearances. See *id.* at 162-163. Under the 1960 regulation, administrative relief was not available unless the claimant could show "that he would be currently entitled to a security clearance." *Id.* at 153 (internal quotation marks omitted). But the *Greene* plaintiff had left national-security-related employment after 1953 and did not seek a new clearance. Because "petitioner, who had to find nonsecurity employment as a result of the 1953 clearance revocation, does not now require and is not seeking current access authorization," the Court held that exhaustion of the procedures established by the 1960 regulation was not required. *Id.* at 163-164.

In both *McCarthy* and *Greene*, the plaintiffs could hypothetically have obtained relief in the administrative process. The plaintiff in *McCarthy*, who was still incarcerated when he filed suit, alleged an ongoing failure to provide adequate treatment for pain following spinal surgery, as well as a failure to place him in a single cell. See Brief for Petitioner at 4, *McCarthy v. Madigan*, 1991 WL 530833. Even if it could not provide monetary relief for past harms, a successful grievance could have led to a change in his medical care or a cell transfer. And the plaintiff in *Greene* could certainly have sought to demonstrate his eligibility for a security clearance under the 1960 regulation. In both cases, it was sufficient that the

plaintiffs' suits *did not in fact seek* relief available in the administrative process; whether they *could have obtained* some form of administrative relief was irrelevant. See *McCarthy*, 503 U.S. at 154 ("[W]e cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in 'other things.'"); *Greene*, 376 U.S. at 164 ("[W]e do not suggest that if petitioner were now seeking access to security-classified information, he would be entitled to have his clearance qualifications judged by other than current regulations. But all he seeks are damages for the Government's unauthorized action and to this much, we hold, he is certainly entitled."). *A fortiori*, it would be futile to require Petitioners to exhaust an administrative procedure designed to ensure that Respondents provide E.F with a FAPE when E.F does not challenge the failure to provide her with a FAPE and, in any event, is no longer attending Respondents' schools. It is not for a defendant to say what form of relief a plaintiff could (or even, in the defendant's opinion, should) have requested; that is a choice for the plaintiff.

Congress, of course, is free to depart from these general administrative law principles. See *Ross*, 136 S. Ct. at 1856-1857. That is precisely what Congress did in the PLRA. There, Congress responded to this Court's decision in *McCarthy* by providing that "[n]o action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are

exhausted." 42 U.S.C. § 1997e(a). As this Court observed in *Booth v. Churner*, 532 U.S. 731, 738-739 (2001), the text of the PLRA's exhaustion provision refers generally to "such administrative remedies as are available," rather than requiring the availability of any particular form of relief as a prerequisite for exhaustion. Because the text makes clear "that Congress meant to preclude the *McCarthy* result" in the prison context, *id.* at 740, the Court concluded that the PLRA requires prisoners now to exhaust *any* administrative remedies that are available, "irrespective of the forms of relief sought," *id.* at 741 n.6.

But the HCPA employs very different language than does the PLRA. Unlike the PLRA, the HCPA does not require exhaustion of all available administrative remedies, but only of available administrative remedies that the plaintiff is "seeking" in his or her "civil action." 20 U.S.C. § 1415(*l*). The HCPA's text thus reaffirms and codifies the futility principles applied in *McCarthy* and *Greene*

2. The Plain Meaning of the HCPA's Text is Consistent With the Statute's History and Purpose

The difference in text between the HCPA and the PLRA is matched by a difference in the statutes' histories and purposes. This Court has explained that Congress enacted the PLRA "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). By contrast, Congress enacted the HCPA to *expand* access to federal courts for children with disabilities asserting violations of their rights—and to overturn this Court's *Smith* decision that channeled such cases into the IDEA (then

called the EHA) process. See H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 4-5 (1985); S. Rep. No. 99-112, 99th Cong., 1st Sess. 2 (1985).

In his speech introducing the HCPA, Senator Lowell Weicker specifically criticized *Smith* for denying parents "direct access to the district courts to enforce rights under section 504 of the Rehabilitation Act even where immediate injunctive relief," which he said was "not available under" the EHA, "may be critical." 130 Cong. Rec. 20,598 (July 24, 1984). The bill as originally introduced contained no provision that specifically discussed exhaustion. As relevant here, the bill simply provided that "[n]othing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes prohibiting discrimination." S. 415, 99th Cong., 1st Sess. § 3 (as introduced Feb. 6, 1985); H.R. 1523, 99th Cong., 1st Sess. § 3 (as introduced Mar. 7, 1985). That provision directly overturned *Smith*. But it said nothing about whether children with disabilities or their parents would be required to exhaust EHA remedies before filing their non-EHA claims in court.

In the committee hearings on the bill, witnesses representing the National School Boards Association (NSBA) called attention to the lack of an exhaustion provision.[7] In line with Respondents' argument, the

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[7] See *Handicapped Children's Protection Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 99th Cong., 1st Sess. 24 (Mar. 12, 1985) (hereinafter "HCPA House Hearing") (statement of Jean Arnold, Esq.); *Handicapped Children's Protection Act of 1985: Hearing Before the*

NSBA urged Congress to adopt a broad exhaustion requirement, under which children with disabilities and their parents could not file a lawsuit under Section 504—or even file a Section 504 complaint with the OCR—if the EHA administrative process could provide *any* relief.[8] In support of that proposed rule, the NSBA pointed to a statement in the *Smith* dissent, which somewhat ambiguously suggested requiring "a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504 or § 1983." *Smith*, 468 U.S. at 1024 (Brennan, J., dissenting). See HCPA Senate Hearing 75 (written statement of the NSBA citing this language from the *Smith* dissent).

The relevant House and Senate committees added exhaustion language, but they did not adopt the NSBA's broad proposal. Instead, as reported in both the House and the Senate, the bill included an

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Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources, 99th Cong., 1st Sess. 75 (May 16, 1985) (hereinafter "HCPA Senate Hearing") (written statement of the NSBA).

[8] See HCPA House Hearing 27 (statement of Jean Arnold, Esq.) ("NSBA further requests that the bill be clarified to provide that handicapped student plaintiffs may resort to Section 504 only where the EHA does not protect the rights of and provide remedies to the handicapped individual. * * * To provide otherwise would allow handicapped plaintiffs to forego the administrative procedures in the EHA and file a complaint, either with OCR or a court, under Section 504."); *id.* at 38 (Arnold expressing agreement with Rep. Bartlett's statement that "in those cases in which 94-142 [the EHA] is applicable, you would prohibit the bypass of the [administrative] due process [procedures]").

exhaustion provision with the same "seeking relief that is also available" language that appeared in the bill as ultimately adopted. See S. 415, 99th Cong., 1st Sess. § 4 (as reported July 25, 1985); H.R. 1523, 99th Cong., 1st Sess. § 3 (as reported Oct. 2, 1985). Both the House and Senate committee reports made clear an intent to codify the futility exception and to affirm that exhaustion would not be required if administrative proceedings could not provide the relief a parent or child was seeking in court. The Senate Report stated that exhaustion would be required "when a parent brings suit under another law"—but only when "*that suit* could have been brought under the EHA." S. Rep. No. 99-112, *supra*, at 3 (emphasis added). A bipartisan group of senators elaborated that parents bringing a non-EHA suit must exhaust "if that suit could have been filed under the EHA," but that exhaustion would not be required "when resort to [EHA] proceedings would be futile." *Id.* at 15 (additional statement of Sens. Hatch *et al.*). If a parent filed a suit seeking a remedy that EHA administrative proceedings could not have provided, that parent plainly could not have filed "that suit" under the EHA, and administrative remedies would be futile under background administrative law principles. In the floor debate, Senator Paul Simon—a member of the committee and of the bipartisan group of senators who signed the additional statement—made the point explicit. He explained that "[w]hen parents choose to file suit under another law that protects the rights of handicapped children, if that suit could have been filed under the Education of the Handicapped Act, parents are required to exhaust the administrative remedies" but that exhaustion would not be required "where the

hearing officer lacks the authority to grant the relief sought." 131 Cong. Rec. 21,392-21,393 (July 30, 1985).

The House Report, too, was explicit on the point. It stated that exhaustion would be required before parents filed a non-EHA suit "where exhaustion would be required under EHA and the relief they seek is also available under EHA." H.R. Rep. No. 99-296, *supra*, at 7 Elaborating on the futility principles that generally apply in determining the scope of exhaustion requirements, the report explained that "it is not appropriate to require the use of due process and review procedures set out in section 615(b) and (c) of EHA before filing a law suit" where "the hearing officer lacks the authority to grant the relief sought." *Id.*[9]

When it adopted the HCPA, then, Congress chose to incorporate language that codified the futility principle excusing exhaustion when the administrative forum lacks power to grant the relief a plaintiff seeks in court—the same principle this Court applied in *McCarthy* and *Greene*. Codifying that principle was fully consistent with the overall thrust of the HCPA—to overturn *Smith* and reaffirm that the federal civil rights of students with disabilities, under statutes like the Rehabilitation Act and Section 1983, provided an independent cause of action that might be asserted regardless of whether a claim under the IDEA was available.

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[9] The House Report also explained, as the text of the exhaustion provision makes clear, that the statute would not require exhaustion of EHA remedies before filing an administrative complaint under the Rehabilitation Act with OCR. See *id.* at 7-8.

The Sixth Circuit's holding, which defers court access for ADA and Rehabilitation Act claims until after exhaustion of IDEA proceedings even when the plaintiffs cannot receive the relief they seek in the administrative forum, directly undermines that purpose. See *Payne*, 653 F.3d at 875 (describing such a holding as "treat[ing] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students" and as thus being "inconsistent with the IDEA's exhaustion provision"). That holding "is easier to reconcile with the Supreme Court's decision in *Smith v. Robinson*, which held that the law that is now IDEA preempted Section 504 and Section 1983-equal protection remedies, than with the Handicapped Children's Protection Act, which overruled *Smith*." Weber, *supra*, § 21.8 at 21:21.

C. The HCPA's Plain Text Avoids Subjecting Disabled Children and Their Parents to Burdensome, Time-Consuming Delays in Cases Where IDEA Proceedings Cannot Grant Them the Relief They Seek

The Sixth Circuit panel majority concluded that parents could too easily evade the exhaustion requirement if they could avoid exhaustion "simply" by limiting their requested relief to a claim for damages. Pet. App. 17 (internal quotation marks omitted). The majority noted that, even where an administrative adjudication cannot provide the relief the petitioner seeks in court, exhaustion *might* provide the petitioner other relief that she finds satisfactory and *might* help to create a record that would assist judicial review. See Pet. App. 10. The short answer to that argument is that it is properly made to Congress. Indeed, as the

previous section shows, such an argument *was* made to Congress, but Congress rejected it. The HCPA specifically requires exhaustion only for "civil actions" that are "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). Under that language, it is precisely the relief the plaintiff "seek[s]" that determines whether exhaustion is required. Even if there might have been good policy justifications for imposing a broader exhaustion requirement, it is not up to the courts to expand that requirement beyond the limits imposed by Congress. See Section A, *supra*.

In any event, just as with debates over exhaustion under 42 U.S.C. § 1983, "the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them." *Patsy*, 457 U.S. at 513. The HCPA, as Congress wrote it, serves an important policy goal: It avoids burdening disabled children and their parents with the futile obligation to undergo time-consuming administrative proceedings before pursuing claims that present issues distinct from the questions of educational benefit relevant under the IDEA, and that seek forms of relief IDEA proceedings cannot provide. The Sixth Circuit's rule, by contrast, imposes wasteful and burdensome delays.

This Court has itself noted that Congress "[r]ecogniz[ed]" that IDEA "proceedings might prove long and tedious." *Honig*, 484 U.S. at 324. Respondents nonetheless assert that IDEA administrative proceedings "provide[] a fast, efficient way to redress [disabled students'] injuries." BIO 19. Respondents point to formal statutory and regulatory

deadlines that, if followed, would ensure that administrative proceedings would conclude within 105 days of filing a due process complaint. BIO 18. Under those deadlines, a due process hearing would take place within 30 days of the filing of the complaint, 20 U.S.C. § 1415(f)(1)(B)(ii), the hearing officer would issue a decision within the next 45 days, 34 C.F.R. § 300.515(a), and the state educational agency would issue a decision on any administrative appeal within 30 days following a request for review, 34 C.F.R. § 300.515(b). Reliance on those formal deadlines is misleading.

Despite the timeline set by the relevant statutory and regulatory provisions, researchers have long noted that in practice "such quick resolution almost never occurs. In discussions with attorneys for children with disabilities, as well as school district attorneys, the refrain echoes—'never saw it happen.'" Mary A. Lunch, *Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York's Special Education System*, 55 Alb. L. Rev. 179, 184 (1991). One experienced administrative adjudicator and scholar explained in 2005 that "[t]he hearings, which are supposed to take 45 days from filing to decision, are getting more and more contentious, complex, and time-consuming." Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 Ed. Law Rep. 35, 37 (2005). He found it "increasingly easy to find hearings that have, comparable to major civil or criminal litigation, taken session after session and month after month." *Id.*

In 2013, the American Association of School Administrators (AASA) observed that "the length of

time needed to schedule and complete a due process hearing, and render a decision on the issues at hand, can significantly delay a remedy for the student." See American Ass'n of School Administrators, Rethinking Special Education Due Process 15 (April 2013), https://perma.cc/XNT6-2E7J. AASA specifically noted that "[w]hile Congress mandated that due process hearings be concluded within a 45-day timeline, in practice, this is rarely the case." *Id.* And even with changes to the administrative process in recent years, "advocates for both families and school districts" continue to find that process "expensive" and "time consuming." Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 Case W Res. L. Rev 143, 159 (2015).[10]

The reason that the administrative process is so time-consuming is straightforward: IDEA due process proceedings are not an informal means of alternative dispute resolution. Rather, "[d]ue process hearings are

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[10] Respondents report that "[a]ccording to one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days." BIO 18 (citing Perry A. Zirkel *et al.*, *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (2007)). Respondents fail to disclose that the study on which they rely was limited to a single state—Iowa—which the study's authors noted "is known for a relatively proactive general and special education system" and "had relatively few [due process] decisions" during the study period. *Id.* at 34. A recent GAO report, by contrast, finds a lack of good quantitative data on the timeliness of IDEA administrative hearings, but concludes that available measures understate the problem of delay. GAO, Special Education: Improved Performance Measures Could Enhance Oversight of Dispute Resolution 23-26 (Aug. 2014), http://www.gao.gov/assets/670/665434.pdf.

court proceedings in almost every relevant sense," with pleading and evidentiary requirements to match. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 450 (2012). As attorneys from the very firm that represents Respondents in this Court explained, such formal procedures mean that "due process does not lend itself to quick resolution of any dispute, unless both parties genuinely desire such a resolution." Kevin J. Lanigan *et al.*, *Nasty, Brutish, and Often Not Very Short: The Attorney Perspective on Due Process*, Rethinking Special Education for a New Century 213, 219, 227 (Chester E. Finn *et al.*, eds., 2001); see also *id.* at 213 (noting that the chapter's conclusions "are based primarily on the particular experiences of Hogan & Hartson attorneys in representing parties on both sides of special education disputes") (footnote omitted). And "[e]ven in cases in which the parties are motivated only by the desire to obtain the best possible services for the student, the drawn-out nature of due process hearings may diminish the importance of the final decision. By the time a decision is reached, which can take months to years, the award granted to a prevailing parent is often a hollow victory." Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for A Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & Educ. 501, 513 (2013)). To require parents to undergo these time-consuming and futile proceedings before even getting into the door of the one forum that can grant them relief imposes a significant burden without sufficient justification.

Where parents and children seek redress for educational deprivations of the sort the IDEA

addresses, and they seek a form of relief IDEA procedures can provide, requiring a first resort to the administrative process balances two interests: (1) the interest in giving local officials the opportunity to set educational policy in the first instance, see *Rowley*, 457 U.S. at 206; and (2) the interest in ensuring that disabled children and their parents have robust procedural protections against the deprivation of their rights, see *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530-533 (2007); *Honig*, 484 U.S. at 323-325; *Rowley*, 457 U.S. at 205-206.

But when a school district has violated a child's rights under a statute *other* than the IDEA, and the relief the child and her parents seek either does not relate to educational adequacy or is not of a form that IDEA proceedings can provide—as is the case here—requiring a first resort to the administrative process imposes cost and delay without clearly advancing the interests that generally underlie the exhaustion requirement. Congress was fully entitled to determine that the marginal benefit of avoiding some disputes and sharpening the record for judicial review in others did not justify the significant burden an exhaustion requirement would place on parents and children when the administrative process could not provide the relief they sought.

To be sure, Congress could have balanced the relevant interests differently, but it did not. The same conclusion the Court reached about Section 1983 exhaustion applies here: "The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."

Patsy, 457 U.S. at 513. If today's Congress believes that it got the balance wrong when it enacted the HCPA, it is free to amend the statute. As we explained in Section B, *supra*, Congress followed precisely that course in the PLRA, which responded to the Court's *McCarthy* decision by imposing a broad exhaustion requirement for suits brought by prisoners. Congress has repeatedly amended the IDEA and its predecessor statute. The HCPA itself was framed as an amendment to the EHA's procedural-rights section, 20 U.S.C. § 1415, and Congress has amended that section multiple times since the HCPA's 1986 enactment—including major statutory reauthorizations in 1990, 1997, and 2004.[11] But Congress has never altered the HCPA's "seeking relief that is also available" language. By essentially taking matters upon itself to alter that language, the Sixth Circuit panel majority erred.

D. Because the Fry Family's ADA and Rehabilitation Act Lawsuit Did Not Seek any Relief Available Under the IDEA, the Lower Courts Erred in Requiring Exhaustion

1. None of the Relief Requested in the Fry Family's Complaint is Also Available in IDEA Proceedings

Under the plain language of the HCPA, this case should not have been dismissed for failure to exhaust. The Fry family brought this case under the ADA and Rehabilitation Act, not under the IDEA. The family

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[11] See Pub. L. No. 108-446 § 101, 118 Stat. 2647 (2004); Pub. L. No. 106-25 § 6, 113 Stat. 41 (1999); Pub. L. No. 105-17 § 101, 111 Stat. 37 (1997); Pub. L. No. 101-476, 104 Stat. 1103 (1990); Pub. L. No. 100-630 § 102(e), 102 Stat. 3289 (1988).

did not claim that the refusal to permit Wonder to accompany E.F to school denied E.F a "free appropriate public education." 20 U.S.C. § 1412(a)(1). Respondents had specifically determined that, because the school offered the services of a human aide, E.F was not deprived of sufficient educational benefits to violate the IDEA. See pp. 11-13, *supra*. The Fry family does not contest that conclusion. As Judge Daughtrey explained in her dissent below, "the Frys' complaint does not tie use of the service dog to [E.F.'s] academic program or seek to modify her IEP in any way " Pet. App. 26. The complaint does not allege any harm to E.F.'s education or any ongoing harm to her development. It does not allege any educational deprivation of the sort that is redressable in the IDEA proceedings. See 20 U.S.C. § 1415(f)(3)(E) (IDEA proceedings provide remedies for denials of free appropriate public education or other deprivations of educational benefits). Rather, the complaint seeks to redress the past social and emotional harm that E.F experienced when she was denied the use of her service dog at school. See BIO App. 11-12.

Because it focuses on past social and emotional harms, the Fry family's complaint seeks one principal form of relief: "damages in an amount to be determined at trial." BIO App. 21 (prayer for relief). It also seeks two ancillary forms of relief on Petitioners' federal claims: (1) "a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, [and] Title II of the Americans with Disabilities Act"; and (2) "attorneys' fees pursuant to the Rehabilitation Act, the Americans with Disabilities Act, [and] 42 U.S.C. § 1988." *Id.*

None of these forms of relief is available under the IDEA. The IDEA does not provide for damages. See p. 5, *supra*. Nor does the IDEA grant state administrative adjudicators the authority to issue a declaration that a school district violated some *other* statute like the ADA or the Rehabilitation Act. Cf. 20 U.S.C. § 1415(f)(3)(E) (hearing officer may decide whether child received a free appropriate public education and was accorded certain related procedural protections under the IDEA), § 1415(k)(3) (hearing officer may decide whether child's misconduct was a manifestation of a disability and whether maintaining the child's current placement is substantially likely to lead to injury). And although the IDEA provides for attorneys' fees, it provides only for fees "[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. § 1415(*i*)(3)(B)(i). Here, the complaint seeks attorneys' fees, not for IDEA proceedings, but instead for the effort to enforce E.F 's distinct rights under the ADA and the Rehabilitation Act. Because none of the relief requested in the complaint is "relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the lower courts erred in dismissing this case for failure to exhaust.

2. This Case Does Not Turn on the Same Questions That Would Have Determined the Outcome in IDEA Proceedings

The Sixth Circuit asserted that this "suit turns on the same questions that would have determined the outcome of IDEA procedures." Pet. App. 10-11. It thus concluded that "the legal injury alleged [was] in essence a violation of IDEA standards." Pet. App. 20. By the plain terms of the statute, however, it is

irrelevant whether the lawsuit would "turn[] on the same questions" as IDEA proceedings or on whether a court might determine that the injury alleged in the suit was "in essence" an IDEA violation. The only question is whether the suit is "seeking relief that is also available" in IDEA proceedings. 20 U.S.C. § 1415(*l*). Because none of the forms of relief the Fry family is seeking in this suit would be available under the IDEA, exhaustion was not required.

In any event, this suit does *not* turn on the same questions that would have determined the outcome of IDEA proceedings. To prevail in IDEA proceedings, E.F would have had to show that Respondents' refusal to allow her to bring Wonder to school denied her a "free appropriate public education" or otherwise "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E). The IDEA requires schools to permit the use of a service animal in some circumstances as a "related service[]," but it does so only when that is "required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). And although the IDEA sometimes requires a school to *teach* a disabled child to use a service animal, see pp. 3-4, *supra*, E.F did not seek instruction in how to use her dog. She simply wanted Respondents to permit Wonder to accompany her at school.

Throughout this dispute, Respondents have maintained the position that the refusal to permit Wonder to accompany E.F did *not* deprive E.F of educational benefits. Respondents noted that E.F 's IEP already "included a human aide providing one-on-one support," and they concluded that "Wonder would

not be able to provide any support the human aide could not also provide." Pet. App. 4. See pp. 11-13, *supra*.

The Fry family does not take issue with Respondents on this point. But that means that Petitioners could not have obtained *any* of the forms of relief that Respondents assert were available in IDEA proceedings. Petitioners could not have obtained any of the "wide ranging remedies for denials of FAPE" to which Respondents point (BIO 14, 31-33), for the simple reason that no party maintains that E.F was denied a free appropriate public education. See generally *Forest Grove Sch. Dist.*, 557 U.S. at 239 (IDEA vests "broad authority to grant 'appropriate' relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE"); *Burlington Sch. Comm.*, 471 U.S. at 369-371 (reimbursement of parental expenses may be required as a remedy when a school district denies a free appropriate public education).[12]

The Fry family brought this suit under the ADA and the Rehabilitation Act precisely because those statutes, unlike the IDEA, do not require a showing of any *educational* deprivation. To prevail in this lawsuit, all E.F. would have to show is that she was denied the right, guaranteed to any person with a disability, to be

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[12] There is no issue of private-school reimbursement here for an independent reason: When the Fry family removed E.F from Respondents' school, they first enrolled her in a public cybercharter, and then in a brick-and-mortar public school in a neighboring county. Accordingly, there is no private-school tuition to reimburse.

accompanied by her service dog in a public facility. See 28 C.F.R. § 35.136. That the refusal to admit the dog took place at a school—rather than a recreation center, public library, or public park—does not change the elements of the claim. Indeed, the ADA and Rehabilitation Act issue here is the same issue that would be presented if E.F. had not been a student at Respondents' schools but instead had been an audience member at a school play. Because nothing in the ADA and Rehabilitation Act claims require any analysis of pedagogical or education-policy questions, resolution of those claims will present questions regarding the application of civil rights law of a sort that federal judges address every day. Any asserted educational expertise of IDEA hearing officers (cf. BIO 18) offers no reason to require exhaustion.[13]

3. This Case Seeks No Change to an IEP

Respondents assert (Resp. Supp. Br 7-8 n.2) that E.F.'s IEP would likely have to be modified if she prevailed on her ADA and Rehabilitation Act claims. There is no basis for such an assertion. As Judge Daughtrey noted in her dissent below, "the request for a service dog would not require a modification of [E.F.'s] IEP, because that request could be honored

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[13] Indeed, because this lawsuit challenges violations of the ADA and Section 504 requirements that go beyond the requirement to provide a free appropriate public education, it is questionable whether exhaustion would have been required even under *Smith*. See *Smith*, 468 U.S. at 1121 ("We do not address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA."). The Sixth Circuit's decision thus arguably went beyond *Smith*—the case Congress overturned in the HCPA.

simply by modifying the school policy allowing guide dogs to include service dogs." Pet. App. 27 (emphasis in original). A school district can comply with a general policy allowing all students with disabilities to be accompanied by their service dogs without writing that policy into any individual student's IEP

Even if a successful ADA and Rehabilitation Act suit might have led Respondents to consider modifying E.F.'s IEP had she stayed in the district, that does not transform the ADA and Rehabilitation Act claims into IDEA claims. And this suit does not seek any prospective change to the IEP in any event. Indeed, it is unlikely that the Fry family would even have standing to seek such prospective relief. By the time they filed suit, they had removed E.F. from Respondents' schools and had enrolled her in a public school in a neighboring county, with no intention of returning. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Since that time, the Fry family has moved to a new residence in that neighboring county, so Petitioners have no ongoing educational dispute with Respondents.

As a result, there are two reasons why the hypothesis that this suit might have led to a change in E.F.'s IEP did not require exhaustion: First, this lawsuit is not seeking—and by the rules of standing likely cannot seek—an order to change the IEP Second, a prospective change to E.F.'s IEP would not have been "available" in IDEA administrative proceedings even if she had remained in Respondents' district, because E.F. alleged no ongoing *educational* harm. Cf. *Ross*, 136 S. Ct. at 1858-1859

(administrative remedy is not "available" if it is merely formally, but not actually, capable of use).[14]

* * *

In the end, the Sixth Circuit's ruling and Respondents' argument would put parents in an untenable position. If a school maintained that its actions did not violate the IDEA because they did not deprive a child of a FAPE, and the parents agreed with that assertion, the parents could not challenge the school's actions under the entirely independent causes of action created by the ADA and the Rehabilitation Act without first bringing an administrative action under the IDEA. In the administrative proceedings, the parents would face a choice. They could acknowledge that the district did not deprive their child of a FAPE, thus waiving any basis for relief. Such a waiver would, of course, vitiate any purpose for following the exhaustion requirement. Alternatively, the parents could go through the motions of pressing the argument that the district did deprive their child of a FAPE, even though they believed that argument to

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[14] For the same reasons, Respondents are wrong to suggest that the complaint's boilerplate request for "any other relief this Court deems appropriate," BIO App. 21, means that the Fry family has necessarily sought relief available under the IDEA. Cf. BIO 30. Because Petitioners no longer live in the district, and allege no ongoing educational harm, their lawsuit cannot seek any remedy other than the retrospective damages (and accompanying declaratory and fees relief) sought in the complaint—relief that Respondents concede is not available in IDEA proceedings. And the absence of an ongoing educational dispute means that prospective remedies would not be "available" in IDEA proceedings in any event.

lack a sound foundation. But that course of action would raise serious ethical questions—and would, at a minimum, unnecessarily extend proceedings and increase the lawyers' bills on both sides.

Congress wisely did not put parents to that dilemma. It provided instead that parents could proceed directly to court on claims that arise under statutes that create independent causes of action, so long as their "civil action" does not "seek[]" relief available in IDEA proceedings. 20 U.S.C. § 1415(*l*). Congress could properly trust that parents would not choose to bypass an IDEA remedy if it would truly serve their children. As this Court has noted, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled." *Rowley*, 458 U.S. at 209. Because the Fry family's "civil action" did not "seek[] relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the lower courts should not have dismissed it for failure to exhaust.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

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STACY FRY, ET VIR., AS NEXT FRIENDS OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

TIMOTHY J. MULLINS
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084

NEAL KUMAR KATYAL
Counsel of Record
EUGENE A. SOKOLOFF
MITCHELL P. REICH*
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

* Admitted only in New York; supervised by members of the firm.

Counsel for Respondents

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether 20 U.S.C. § 1415(*l*) required petitioners to exhaust the state administrative procedures set forth in the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, before filing a civil action seeking monetary and declaratory relief under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

PARTIES TO THE PROCEEDING

Stacy Fry and Brent Fry were plaintiffs-appellants below as next friends of E.F., a minor.

Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes were defendants-appellees below.

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IN THE

Supreme Court of the United States

No. 15-497

STACY FRY, ET VIR., AS NEXT FRIENDS OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS

INTRODUCTION

In 20 U.S.C. § 1415(*l*), Congress struck a balance between the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and other laws that protect the rights of children with disabilities. In the provision's first half, Congress established that the IDEA does not "limit" plaintiffs' substantive rights under any other laws; parents may protect their children using the full panoply of "rights, procedures, and remedies" that the Constitution, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, afford. 20 U.S.C. § 1415(*l*). But Congress did not stop there. The second half of the provision imposes one important

limitation: If parents wish to use these other laws to "seek[] relief that is also available under [the IDEA]," they must first attempt to obtain that relief through the IDEA's procedures. *Id.*

This case presents the question whether plaintiffs who seek relief that is in *substance* available under the IDEA can sidestep that limitation merely by demanding that relief in a *form* the IDEA does not provide. The answer is no. The statute's text is concerned with the actual "redress or benefit" a plaintiff seeks, not the form in which it is pled. Black's Law Dictionary 1317 (8th ed. 2004) (defining "relief"). In other cases where it has had to characterize the relief sought in a complaint, the Court has time and again looked to the substance rather than the form of the relief demanded to determine "on which side of the line a particular case falls." *Papasan* v. *Allain*, 478 U.S. 265, 278-279 (1986). Any other interpretation of section 1415(*l*) would render it a formalistic shell—inviting litigants to opt out of exhaustion simply by incanting the right legal formulation.

Under this straightforward application of the statute's terms, petitioners' complaint was properly dismissed for failure to exhaust. That complaint asks for monetary relief that could be obtained under the IDEA by replacing the word "damages" with the label "retroactive reimbursement" or "payment for compensatory education." And it asks for a declaratory judgment that would effectively determine that a particular accommodation should have been included in an Individualized Educational Program—the *core* type of relief that the IDEA is designed to provide. If section 1415(*l*) is more than just a rule of pleading etiquette, these claims seek "relief" the

IDEA makes "available," and petitioners are required to exhaust the IDEA's remedies before bringing them to court.

STATUTE INVOLVED

The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, codified at 20 U.S.C. § 1415(*l*), provides:

> **Rule of construction.**
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT

A. Statutory Background

1. Congress has enacted three separate but overlapping statutes that protect the rights of schoolchildren with disabilities. The ADA requires state and local governments to provide reasonable accommodations for individuals with disabilities. 42 U.S.C. § 12132. The Rehabilitation Act prohibits disability discrimination in federally funded programs, including public schools. 29 U.S.C. § 794(a). And the IDEA—the most detailed and extensive of the stat-

utes—requires participating States to provide special education and related services to children with disabilities.

The centerpiece of the IDEA is "an enforceable substantive right to a free appropriate public education," also known as a FAPE. *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). That holistic guarantee aims to "prepare" children with disabilities "for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). "The primary vehicle for implementing these congressional goals is the 'individualized educational program,'" or IEP, a tailored set of educational goals and plans that "the [IDEA] mandates for each disabled child." *Honig* v. *Doe*, 484 U.S. 305, 311 (1988).

Each IEP is developed through "a cooperative process" in which "[p]arents and guardians play a significant role." *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005). That process begins with a "full and individual initial evaluation" of the child and her developmental needs, 20 U.S.C. § 1414(a)(1)(A), and continues with regular meetings of a specially-established "IEP Team"—comprising the child's parents, teachers, and education officials—that monitors the child's development and adjusts the IEP as necessary. *Id.* § 1414(d)(1)(B), (3)-(4). Among other things, each IEP must include a "statement" of "how the [child's] disability affects the child's participation in appropriate activities," *id.* § 1414(d)(1)(A)(i)(I), and "measurable annual goals * * * designed to * * * enable the child to be involved in and make progress in the general educational curriculum." *Id.* § 1414(d)(1)(A)(i)(II). An IEP must also identify what "special education and related services and supplementary aids and services" the

child needs, *id.* § 1414(d)(1)(A)(i)(IV), including any "specially designed instruction" the child requires to "meet [her] unique needs," *id.* § 1401(29), as well as any "related services" necessary "to assist [the] child * * * to benefit from special education." *Id.* § 1401(26). The IEP must also specify any "program modifications or supports for school personnel" necessary to enable the child "to be educated and participate with other children" in school activities. *Id.* § 1414(d)(1)(A)(i)(IV).

When parents and educators disagree on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child"—including the content or implementation of an IEP—the IDEA provides an administrative process to resolve the dispute. *Id.* § 1415(b)(6). At the outset of that process, the state or local educational agency must "convene a meeting with the parents and the relevant member or members of the IEP Team" to attempt to resolve the disagreement cooperatively. *Id.* § 1415(f)(1)(B)(i). If that does not resolve the dispute "to the satisfaction of the parents," *id.* § 1415(f)(1)(B)(ii), parents have the right to an "impartial due process hearing" before an "objectiv[e]" hearing officer. *Id.* § 1415(f)(1)(A), (f)(3)(A). That hearing is governed by "an elaborate set of * * * 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Sch. Comm. of Town of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 368 (1985).

If, at the conclusion of a due process hearing, the hearing officer determines that a child has not "received a free appropriate public education," the IDEA authorizes her to award "such relief as [she]

determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009) (explaining that although the statute "only provides a general grant of remedial authority to 'court[s],'" the Court has interpreted it to provide remedial authority to "hearing officers as well"). It is "undisputed" that a hearing officer may declare a child's IEP is unlawful. Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 Nat'l Ass'n Admin. L. Judiciary 1, 9 (2011); *see* 20 U.S.C. § 1415(f)(3)(E). And it is also "clear beyond cavil," that hearing officers may award injunctive relief requiring that an IEP be modified. *Burlington*, 471 U.S. at 370; *see* Zirkel, *supra*, at 16 nn.67-68, 17.

Hearing officers may also award at least two forms of monetary relief. First, they may award "retroactive reimbursement" of money spent on private education during any period the school failed to provide a FAPE. *Burlington*, 471 U.S. at 363, 370; *see Forest Grove*, 557 U.S. at 244 n.11; *Florence Cty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 13 (1993); *see also* 20 U.S.C. § 1412(a)(10)(B)(ii). Second, hearing officers may award prospective monetary relief for "compensatory education" including tutoring, counseling, and remedial therapy designed to compensate for "educational services [a] child should have received in the first place." *Reid ex rel. Reid* v. *Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005); *see, e.g.*, *Foster* v. *Bd. of Educ. of City of Chi.*, 611 F. App'x 874, 878 (7th Cir. 2015); *Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 277-278 (3d Cir. 2014); *Streck* v. *Bd. of Educ. of E. Greenbush Cent. Sch. Dist.*, 408 F. App'x 411, 415 (2d Cir. 2010).

Courts have generally concluded, however, that the IDEA does not permit awards of general "tort-like" damages. *Polera* v. *Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 485-496 (2d Cir. 2002) (citation omitted).

If a parent is dissatisfied with any part of a hearing officer's decision, she may "bring a civil action with respect to the complaint" in either state or federal court "without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A), (i)(3)(A).[1] A court hearing such a suit must "receive the records of the administrative proceedings," "hear [any] additional evidence at the request of a party," and "grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C).

2. This Court considered the interaction between the IDEA (then referred to as the Education of the Handicapped Act (EHA)) and other statutory and constitutional provisions in *Smith* v. *Robinson*. In that case, the parents of a child with cerebral palsy brought suit under 42 U.S.C. § 1983, the Rehabilitation Act, and other laws seeking to require a State to pay for their child's placement in a private educational facility. *Smith*, 468 U.S. at 995. The Court concluded that the parents could not assert the same "substantive rights" under these statutes as were "available under" the EHA. *Id.* at 1021. In its view, the EHA's "carefully tailored scheme" indicated that Congress intended that statute to be the "exclusive avenue" for vindicating a child's right to a FAPE. *Id.*

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[1] If the hearing was conducted before a local educational agency, parents must lodge an intermediate appeal with the State educational agency. *See* 20 U.S.C. § 1415(g).

at 1012-13. Because the EHA did not provide for the recovery of attorneys' fees, the Court rejected an award of fees the parents had obtained under the Rehabilitation Act and 42 U.S.C. § 1988. *Smith*, 468 U.S. at 1011.

Justice Brennan, joined by Justices Marshall and Stevens, dissented. In the dissenters' view, "[t]he natural resolution of the conflict between the EHA" and section 1983 and the Rehabilitation Act "is to require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts." *Id.* at 1024 (Brennan, J., dissenting). As long as a plaintiff had exhausted her administrative remedies, the dissenters reasoned, a subsequent award of fees did "not in any way conflict with the goals or operation of the EHA." *Id.* at 1025.

Congress adopted the dissenters' view two years later with the Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99-372, 100 Stat. 796. According to the bill's chief sponsor, the HCPA was "a direct response" to *Smith*'s conclusion that the EHA "does not allow the award of attorneys' fees to parents, who, after exhausting all available administrative procedures, prevail in a civil court action to protect their child's right to a free and appropriate education." *Handicapped Children's Protection Act of 1985: Hearing on S.415 Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 99th Cong. 1 (1985) (opening statement of Sen. Weicker); *see* 131 Cong. Rec. S10,398-400 (daily ed. July 30, 1985) (statements of Sens. Stafford, Hatch, Kennedy, Kerry) (discussing the need to provide for fee awards). The HCPA sought to "correct this error" in two ways. 132 Cong. Rec.

S9277 (daily ed. July 17, 1986) (statement of Sen. Weicker). First, it made fees available in actions to enforce the EHA. *See* HCPA § 2, 100 Stat. 796. Second, it added a "rule of construction" to the EHA clarifying that "[n]othing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under" the Constitution or federal laws "protecting the rights of children with disabilities." HCPA § 3, 100 Stat. 797.

Congress made clear, however, that its corrective was not intended to diminish "Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child." *Smith*, 468 U.S. at 1011. Accordingly, the HCPA also added a clause stating that "before the filing of a civil action under [other] laws seeking relief that is also available under this part," the EHA's procedures "shall be exhausted to the same extent as would be required had the action been brought under this part." HCPA § 3, 100 Stat. 797 The bill's sponsors explained that this language "makes clear that nothing in" the HCPA "should be interpreted to allow parents to circumvent the due process procedures and protections created under the EHA." S. Rep. No. 99-112, at 15 (1985) (Senate Report) (additional views); *see* 131 Cong. Rec. at S10,400 (statement of Sen. Simon) (similar).[2] If a

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[2] Congress ultimately enacted the version of Section 3 explained in the "additional views" cited here. The cited passages discuss the text of an amendment accepted by the Senate as a substitute for the committee's version of the bill. *See* 131 Cong. Rec. at S10,465; *id.* at S10,397, 10,401 (adopting the substitute amendment). That language prevailed in conference with the

suit filed under another law "*could have been filed* under the [EHA]," one of the law's sponsors explained, plaintiffs must "exhaust the administrative remedies to the same extent as would have been necessary if the suit had been filed under the [EHA]." 131 Cong. Rec. S10,400-01 (statement of Sen. Simon) (emphasis added); *see* Senate Report 3, 15; H. Rep. No. 99-296, at 7 (1985) (House Report).

B. Proceedings Below

1. Petitioner E.F. was born with cerebral palsy, which "significantly limits her motor skills and mobility." Resp. App. 6; Pet. App. 3.[3] E.F.'s condition entitles her to a "special education and related services" under the IDEA. 20 U.S.C. § 1401(9); *see* § 1412(a)(1); Pet. App. 2-3.

When E.F. enrolled at Ezra Eby Elementary School for the 2009-2010 school year, E.F.'s parents—petitioners Stacy and Brent Fry—and the school had settled on an IEP that offered her a full-time human aide for one-on-one support. Pet. App. 4; Resp. App. 8. The aide "accompan[ied]" E.F. "while at school." Pet. App. 16. E.F. had also been prescribed a service dog named "Wonder." Resp. App. 6-7. The dog is "specially trained" to assist E.F. with tasks such as retrieving dropped items and taking off her coat. Resp. App. 7; Pet. App. 3. It also helps her "to devel-

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House and was eventually signed into law. *See* 132 Cong. Rec. H4529 (daily ed. July 16, 1986); *id.* at H4845 (daily ed. July 24, 1986); HCPA § 3, 100 Stat. 797.

[3] Because the District Court dismissed the case on the pleadings, this statement takes as true the facts alleged in the complaint.

op independence and confidence and helps her to bridge social barriers." Resp. App. 7.

In October 2009, the Frys sought permission for E.F. to bring the dog to school. Pet. App. 3-4; Resp. App. 8. The school decided not to grant that permission. Pet. App. 4. In a "specially convened" meeting of E.F.'s IEP team, school officials determined that the dog "would not be able to provide any support the human aide could not provide." *Id.* As a result, E.F.'s IEP was changed to state that her parents had "requested a service dog for their daughter to enhance her independence," and that this request was denied because E.F.'s "physical and academic needs are being met through the services/programs/ accommodations of the IEP." Resp. App. 8.

The school subsequently agreed to a 30-day trial period. *Id.*; Pet. App. 4. During that period, the school placed some limitations on E.F.'s use of the dog and kept a log of parent and staff concerns. Resp. App. 8; J.A. 27 The log showed that one teacher and two students were allergic to dog dander; one parent was concerned because her child had been attacked by a dog several years before; and four parents expressed concern that the service dog would be a distraction to other students. J.A. 27-28. At the end of the trial period, the school declined to revisit its decision not to admit the dog. Pet. App. 4. As a consequence, the Frys pulled E.F. out of public school and began to homeschool her at their own expense. *Id.*; Resp. App. 9.

The Frys then filed a complaint with the Office of Civil Rights (OCR) at the Department of Education. Resp. App. 9. The OCR determined that the school's refusal to accommodate the dog had limited E.F.'s

"ability to access the District's programs and activities with as much independence as possible" in violation of the ADA and the Rehabilitation Act. J.A. 36. Without admitting liability, the school agreed to let E.F. attend school with the dog the following fall. Pet. App. 4; J.A. 43-44. Although it did not change E.F 's IEP, the school agreed to "convene a transition meeting of [s]chool administrators and all staff" to "determine how to fully integrate [E.F.'s] service dog into the educational environment." J.A. 48-49. And it agreed to call a meeting of its "IEP team" to "identify steps to ensure [E.F.'s] transition back to school and her receipt of a FAPE." *Id.* The Frys chose to send E.F to another school in a different district instead. Resp. App. 10.

2. The Frys then filed this suit in federal court, claiming that respondents violated the ADA, the Rehabilitation Act, and a Michigan civil rights law by "refus[ing] to allow Wonder to act as a service dog for [E.F.]." Resp. App. 15.[4] The complaint alleged that respondents' refusal "interfere[d] with [E.F.]'s ability to form a bond with Wonder" and "compromised Wonder's ability to effectively assist [E.F] outside of school." Resp. App. 7. It also alleged that E.F. had to be homeschooled for two years "using an online curriculum," burdening the family with "added educational responsibilities" and depriving her of access to a teacher with "specific training in teaching methods that [she] required." Resp. App. 9-10. E.F.'s time away from school also allegedly denied

[4] The District Court declined to exercise supplemental jurisdiction over the Frys' state law claim, and it is no longer at issue.

her "the opportunity to interact with other students," causing her emotional and psychological harm. Resp. App. 11.

The Frys demanded three types of relief to remedy these alleged harms. First, they asked the court to "[i]ssue a declaration that [respondents] violated" the Rehabilitation Act and the ADA. Resp. App. 21. Second, they asked for "damages in an amount to be determined at trial." *Id.* And finally, they asked the court to "[g]rant any other relief [it] deems appropriate." *Id.* The Frys also sought attorneys' fees. *Id.*

The District Court dismissed the complaint without prejudice. Reviewing the Frys' allegations, the court "fail[ed] to see how" allowing the dog into the school "would not—at least partially—implicate issues relating to EF's IEP." Pet. App. 49. "[H]aving Wonder accompany EF to recess, lunch, the computer lab and the library would * * * require changes to the IEP." *Id.* As would "handling Wonder on the playground or in the lunchroom." *Id.* Because "[a]ll of these things undoubtedly implicate EF's IEP," the court said, petitioners had to "exhaust the administrative remedies available under the IDEA before filing" their lawsuit. Pet App. 49-50.

3. The Sixth Circuit affirmed. The court concluded that "[t]he Frys allege in effect" that respondents "denied [E.F.] a free appropriate public education." Pet. App. 11. The Court of Appeals found that the thrust of the complaint was that "[d]eveloping a bond with Wonder" would allow "E.F to function more independently outside the classroom." Pet. App. 13. That was "an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be." *Id.* Indeed, "developing a

working relationship with a service dog should have been one of the 'educational needs that result from the child's disability' used to set goals in E.F.'s IEP." *Id.* (quoting 20 U.S.C. § 1414(d)(1)(A)(i)(II)). While the court recognized that "[t]he Frys do not in so many words state that Wonder enhances E.F.'s educational opportunities," it noted that "if this is enough to avoid the exhaustion requirement, then any carefully pleaded claim under the ADA or Rehabilitation Act could evade the exhaustion requirement." Pet. App. 19.

The Sixth Circuit also noted that the Frys had never argued that exhaustion would be "futile." Pet. App. 17. While it was "far from clear" that the Frys could make the necessary showing, the waiver meant the court could not "decide whether the exhaustion requirement should be excused as futile." *Id.*

The Court of Appeals denied the Frys' timely motion for rehearing en banc. Pet. App. 53-54. This Court granted their petition for certiorari.

SUMMARY OF ARGUMENT

Section 1415(*l*) requires plaintiffs to exhaust the IDEA's procedures before "seeking relief"—however characterized—"that is also available under [the IDEA]." Because petitioners' complaint asks for several kinds of relief that could also be obtained, in substance, under the IDEA, it was properly dismissed for failure to exhaust.

1. Statutory text, precedent, and context all establish that section 1415(*l*)'s exhaustion requirement turns on the substance and not the form of a plaintiff's request for relief. The "familiar meaning" of the term "relief" means simply "any 'redress or benefit' provided by a court"—and the "benefit" a plaintiff

seeks does not depend on the words he uses to describe it. *United States* v. *Denedo*, 556 U.S. 904, 909 (2009) (citation omitted). The Court consistently "look[s] to the substance rather than to the form of the relief sought" in interpreting analogous provisions—like the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*—that make a plaintiff's right to sue dependent on the type of "relief" he seeks. *Papasan*, 478 U.S. at 278-279. The Court should apply that same substance-over-form approach here, particularly given that section 1415(*l*) asks what relief is "*available*" under the IDEA—a word that refers to what "may be obtained * * * *practically speaking*" and not just "on the books." *Ross* v. *Blake*, 136 S. Ct. 1850, 1858-59 (2016) (emphasis added; citation omitted).

Any other construction would reduce section 1415(*l*) to an empty formality. If plaintiffs could opt out of section 1415(*l*) merely by phrasing a request as one for "damages," they could in effect obtain any remedy the IDEA provides without bothering to exhaust. That outcome would undermine Congress's efforts to ensure that parents and school administrators, not generalist courts, have the principal role in resolving disputes over the education of children with disabilities.

For three decades, *every* court of appeals that has interpreted section 1415(*l*) has agreed that the form of a plaintiff's prayer for relief is immaterial. Congress has not disturbed that judgment—even when reenacting the provision in 2004—and neither should the Court.

2. Petitioners and the Government contend that a prayer for relief phrased as a request for damages is categorically exempt from section 1415(*l*). But they offer no reason—none—why the statute should be given this formalistic construction. Indeed, the cases they cite support the opposite conclusion. And the Government itself took the opposite position five years ago in the Ninth Circuit and convinced the court, correctly, to adopt a functional construction of the statute.

Petitioners are also wrong to suggest that plaintiffs are exempt from section 1415(*l*) if their complaint does not allege an IDEA violation. The sole purpose of section 1415(*l*)'s exhaustion requirement—apparent on its face—is to require plaintiffs to exhaust claims brought under statutes *other than* the IDEA. Nor can plaintiffs escape the statute's requirements by conceding that a school did not violate the IDEA; that concession may be wrong, and does not alter what relief the IDEA process could in fact provide them. Petitioners' attempts to find a footing for their formalistic position in legislative history and policy are likewise unavailing.

3. Under these principles, petitioners were required to exhaust before filing this suit. Their complaint seeks at least three categories of relief also available in substance under the IDEA:

a. The complaint asks for "damages" for the injuries alleged in the complaint, Resp. App. 21, including the costs petitioners incurred homeschooling E.F. after she was denied use of a service dog, Resp. App. 8-10, and the developmental and scholastic injuries E.F. suffered as a result. Resp. App. 7, 10-11. IDEA administrators could award the very same monetary

relief in the form of "retroactive reimbursement" for private education costs, *Burlington*, 471 U.S. at 369, and "payments" to "replace[] educational services [E.F.] should have received in the first place." *Reid*, 401 F.3d at 523. The only difference would be semantic.

b. Petitioners' complaint also effectively requests a declaration that excluding a service dog from E.F.'s IEP was unlawful. Resp. App. 8, 21. But a declaration that certain services must be included in the IEP is *the* core remedy the IDEA provides. *See* 20 U.S.C. § 1415(f)(3)(E). Furthermore, issuing such a declaration would necessarily require changes to E.F.'s IEP, another form of relief the administrative process offers. The fact that petitioners have changed school districts is irrelevant; section 1415(*l*) does not allow plaintiffs to render relief "[un]available" by voluntarily foregoing the opportunity to obtain it.

c. Petitioners' complaint requests, last, "any other relief th[e] [c]ourt deems appropriate." Resp. App. 21. This request invokes the court's authority to award any relief to which petitioners are entitled, *see* Fed. R. Civ. P. 54(c), and so it too seeks numerous forms of relief "available under [the IDEA]." 20 U.S.C. § 1415(*l*).

4. Petitioners never claimed below that exhaustion would be "futile." That argument is therefore not properly before the Court. In any event, there is no basis to excuse petitioners from exhaustion: Administrators *could* award in substance the relief they seek.

ARGUMENT

I. THE IDEA REQUIRES ADMINISTRATIVE EXHAUSTION OF ANY CLAIM SEEKING RELIEF THAT IS IN SUBSTANCE AVAILABLE UNDER THE IDEA

A. Section 1415(*l*)'s Text And Purpose Establish That Plaintiffs Must Exhaust Claims Seeking Relief That Is In Substance Available Under the IDEA

Section 1415(*l*)'s text contains a simple command: Before plaintiffs may file a claim "seeking relief that is also available under [the IDEA]," they must exhaust the IDEA's administrative procedures. 20 U.S.C. § 1415(*l*). Plaintiffs cannot flout that command through artful pleading. If a plaintiff seeks relief that is *in substance* available under the IDEA, he cannot avoid exhaustion merely by demanding that relief in a *form* the IDEA does not provide. This commonsense conclusion follows from the plain meaning of the words "relief" and "available"; from the Court's consistent practice of privileging the substance of prayers for relief over their form; and from the statute's purpose of establishing a meaningful procedural check on suits against state agencies, rather than a toothless pleading suggestion. Every circuit that has interpreted section 1415(*l*) has agreed, and this Court should not disturb that consensus.

1. Section 1415(*l*)'s text and this Court's precedents require an examination of the substance rather than the form of the prayer for relief

Start with the statute's text. Section 1415(*l*) states that a plaintiff must exhaust IDEA remedies before filing "a civil action * * * seeking relief that is also available under [the IDEA]." The word "relief" has a "familiar meaning" in the law: It "encompasses any 'redress or benefit' provided by a court." *Denedo*, 556 U.S. at 909 (quoting Black's Law Dictionary 1317). And "available," as the Court reiterated just last Term, means "that which 'is accessible or may be obtained.'" *Ross*, 136 S. Ct. at 1858-59 (quoting *Booth* v. *Churner*, 532 U.S. 731, 737 (2001)). Straightforwardly read, section 1415(*l*) thus makes exhaustion hinge on what "redress or benefit" a plaintiff requests: If her complaint asks for a benefit that "may be obtained" through the IDEA's administrative procedures, then the parties must attempt to resolve their dispute in that forum, before proceeding (if necessary) to court.

Plaintiffs therefore cannot evade the IDEA process simply by recasting a request for a benefit available under the IDEA in a form the statute does not recognize. A parent cannot, for instance, go straight to court to obtain "retroactive reimbursement" for private educational expenses—a remedy the IDEA "undoubtedly" authorizes—merely by "characteriz[ing] [that] reimbursement as 'damages.'" *Burlington*, 471 U.S. at 370; *see* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). The "redress or benefit" the plaintiff would be seeking from the court is one that the IDEA's procedures

could provide. That the plaintiff has asked for that benefit using a different label is irrelevant; the *substance* of the "relief" the plaintiff "seek[s]" is "available under [the IDEA]," and thus she must exhaust administrative remedies before pursuing it in court.

a. This commonsense interpretation of section 1415(*l*) accords with the Court's longstanding approach to construing prayers for relief. Many other statutes and legal rules restrict the types of relief plaintiffs may seek from particular defendants or in particular forums. The Court has consistently refused to render such provisions toothless by uncritically accepting the plaintiff's characterization of their request for relief. Instead, it "discern[s] on which side of the line a particular case falls" by "look[ing] to the *substance* rather than to the *form* of the relief sought." *Papasan*, 478 U.S. at 278-279 (emphasis added).

Take, for instance, the Employee Retirement Security Income Act (ERISA). Section 502(a)(3) of that statute authorizes participants, beneficiaries, and fiduciaries of employee retirement plans to "obtain * * * appropriate equitable relief" to redress violations of a plan's terms. 29 U.S.C. § 1132(a)(3). By its plain text, this provision bars plaintiffs from seeking to recover non-equitable relief such as money damages. *See Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993). The Court has therefore concluded that ERISA plaintiffs cannot sue for relief that, although *styled* as equitable, would "in essence" or in "substance" constitute an award of money damages. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002); *see Montanile* v. *Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct.

651, 657 (2016) (explaining that "whether the remedy a plaintiff seeks 'is legal or equitable depends on * * * the *nature* of the underlying remedies sought'" (emphasis added; citation omitted)). Thus, in *Great-West*, the Court held that an insurer could not obtain an "injunction to compel the payment of money past due" under a retirement plan. 534 U.S. at 210; *see id.* at 208. Although the insurer "characterize[d] the relief sought as 'equitable,'" the Court explained that the insurer was actually "seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money." *Id.* at 210, 221. Construing the statute to permit such a recovery, the Court said, would render "[the] statutory limitation to injunctive relief * * * meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id.* at 211 n.1; *see id.* at 216.

Or consider this Court's cases construing 5 U.S.C. § 702(a), a provision of the Administrative Procedure Act (APA) that waives the Federal Government's sovereign immunity against "[a]n[y] action in a court of the United States seeking relief other than money damages." In order to determine whether a claim asks for "money damages" within the meaning of the statute, the Court looks to "the *substance* of the [party's] suit." *Dep't of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (emphasis added). So, in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), the Court held that a suit seeking to "[e]njoin" federal officers "from failing or refusing to reimburse" a state for Medicaid expenditures was not barred by section 702(a) because "the nature of the relief sought" was not "compensation for * * * damage" but "enforce[ment] [of Medicaid's] statutory mandate itself,

which happens to be one for the payment of money." *Id.* at 887 n.10, 900-901 (citation and emphasis omitted); *see id.* at 917 (Scalia, J., dissenting) (stating that the Court "focuses on the right question: whether the claim is *in substance* one for money damages" (emphasis added)).[5] Conversely, in *Blue Fox*, the Court held that a party's request to impose "an 'equitable lien'" on certain Department of Army funds *was* "ultimate[ly] [a] claim * * * for 'money damages'"—notwithstanding that it was styled as "equitable"—because the "goal" of the lien was "to seize or attach money * * * as compensation for [a] loss" rather than to obtain "specific relief." 525 U.S. at 262-263.

The Court has applied this same substance-over-form approach to construing prayers for relief throughout its case law. It has held that the Eleventh Amendment bars parties from suing state officials for "[r]elief that *in essence* serves to compensate" them for past violations of federal law—whether that "relief is expressly denominated as damages" or is "tantamount to an award of damages * * *, even though styled as something else."

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[5] In his dissent in *Bowen*, Justice Scalia expressed concern that parts of the majority opinion could be taken to imply that section 702(a) waived immunity against any complaint framed as a "prayer for an injunction," regardless of "the substance of the claim." 487 U.S. at 915-916; *see id.* (arguing that this conclusion would "reduce [section 702(a)] to an absurdity" by making it contingent on "mere form"). The Court foreclosed that interpretation in *Blue Fox*, making clear that its analysis in *Bowen* "did not turn on distinctions between 'equitable' actions and other actions," but rather on "the substance of the State's suit." *Blue Fox*, 525 U.S. at 261-262.

Papasan, 478 U.S. at 278 (emphasis added) (citing cases). It has concluded that 28 U.S.C. § 1500 prohibits parties from "seek[ing] overlapping relief" from the Court of Federal Claims and another court, even if "[t]he formal label affixed to the form of relief sought" differs. *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 320 n.2 (2011) (Sotomayor, J., concurring in the judgment) (describing the Court's holding in *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993)). And it has held that a party should be deemed to prevail in obtaining "the relief he sought" for purposes of 42 U.S.C. § 1988 if he "obtain[s] *the substance* of what he sought," even though by a different "means" than the party requested. *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987) (emphasis added); *see Lawyer* v. *Dep't of Justice*, 521 U.S. 567, 579 (1997) (similar).[6]

It is reasonable to presume that Congress intended to incorporate the same "familiar meaning" of the term "relief" in section 1415(*l*). *Denedo*, 556 U.S. at 909; *see, e.g.*, *Astrue* v. *Ratliff*, 560 U.S. 586, 591 (2010) (presuming that a term "carries its usual and

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[6] *See also, e.g.*, *California* v. *Grace Brethren Church*, 457 U.S. 393, 407-408 (1982) (holding that a court "enjoin[s], suspend[s] or restrain[s] the * * * collection of [a] tax under State law" within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341, if it "issu[es] a declaratory judgment" that "in every practical sense operate[s] to suspend collection of * * * state taxes" (quoting *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943))); *Bowen*, 487 U.S. at 916 (Scalia, J., dissenting) (explaining that "in the 'murky' area of Tucker Act jurisprudence * * * one of the few clearly established principles is that the substance of the pleadings must prevail over their form" in determining whether a suit seeks "a money judgment" (citation omitted)).

settled meaning"); *Abramski* v. *United States*, 134 S. Ct. 2259, 2270 (2014) (construing a term consistent with "courts' standard practice, evident in many legal spheres and presumably known to Congress, of ignoring artifice when identifying the parties to a transaction"). If "equitable relief" is relief that is in "substance" equitable, *Great-West*, 534 U.S. at 216; and "relief other than money damages" is relief that is in "substance" non-compensatory, *Blue Fox*, 525 U.S. at 262; then relief "available under [the IDEA]" is relief that can *in substance* be obtained through the IDEA's procedures.

b. This construction is reinforced by the statutory term "available." As the Court explained last Term, the word "available" refers to something that is "capable of use" or that "may be obtained * * * *practically speaking*." *Ross*, 136 S. Ct. at 1858-59 (emphasis added). For this reason, *Ross* instructed courts to determine whether "remedies" are "available" for purposes of the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e, by considering whether those remedies are available "in practice" and not simply "on the books." *Ross*, 136 S. Ct. at 1859. Because that case involved allegations that a formally available grievance procedure was incapable of use, the Court identified three ways "relevant [t]here" in which on-the-books remedies may be effectively unavailable. *Id.* at 1859-60; *see id.* at 1860-61 (describing issues in that case). Like many principles of exhaustion, however, the Court's interpretation "runs both ways." *Id.* at 1857 n.1. A grievance procedure is surely "available" for purposes of the PLRA if potential complainants are aware of and can in practice make use of it, even though it is not memorialized in any official docu-

ment. *See, e.g.*, *Matthews* v. *Cordeiro*, 256 F. App'x 373, 375 (1st Cir. 2007) (per curiam) (concluding that "the practice of referring claims of excessive force directly to the superintendent evidences * * * an [available] administrative remedy"). And—to take an example from ordinary usage—one would say that "a copyist job is available" if an employer is in fact hiring someone to perform copying work, even if (for reasons of his own) the employer has given that job another title such as "assistant." By the same token, if IDEA hearing officers can in practice award a plaintiff the relief he seeks, even though using different terms, that relief is "available" within the meaning of section 1415(*l*).

2. A formalistic construction of section 1415(*l*) would undermine the statute's purpose

This construction is also supported by section 1415(*l*)'s background and purpose. As discussed above, Congress enacted section 1415(*l*) to achieve two objectives. In the provision's first half, Congress sought to overturn the Court's holding in *Smith* v. *Robinson* that the IDEA precludes plaintiffs from seeking relief for children with disabilities by means of other statutes. *See* 20 U.S.C. § 1415(*l*) (providing that "[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under" "such laws"); House Report 6 (explaining that section 1415(*l*) "reaffirm[s] the viability of section 504 and other federal statutes * * * as vehicles for securing the rights of handicapped children and youth"). And in the provision's second half—the language at issue in this case—Congress sought to "make[] clear" that while the IDEA "does

not affect the applicability of other Federal laws related to special education," it also does not "allow parents to *circumvent* the due process procedures and protections created under the [IDEA]" by "fil[ing] suit under another law that protects the rights of handicapped children." Senate Report 15 (emphasis added). Thus, "parents are required to exhaust the [IDEA's] administrative remedies" if "[a] suit *could have been filed* under the [IDEA]." 131 Cong. Rec. S10,400-01 (statement of Sen. Simon) (emphasis added). Congress thereby reaffirmed the view, endorsed by both the majority and the dissenters in *Smith*, that the IDEA "require[s] a plaintiff with a claim covered by the [IDEA] to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504 or § 1983." *Smith*, 468 U.S. at 1024 (Brennan, J., dissenting); *see id.* at 1019 n.23 (majority opinion) ("Lower courts appear to agree * * * that unless doing so would be futile, [IDEA] administrative remedies must be exhausted before a § 504 claim for *the same relief available under the [IDEA]* may be brought." (emphasis added)).

Interpreting section 1415(*l*) to turn on the form and not the substance of the "relief" a plaintiff seeks would for all practical purposes overthrow the latter objective. If plaintiffs were exempt from the statute's exhaustion requirement so long as they sought relief in a *form* unavailable under the IDEA, litigants could "circumvent" the IDEA whenever they chose simply by framing a prayer for relief as a request for damages. That would not be difficult: as the Court has recognized, "any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction"—and vice versa. *Great-West*,

534 U.S. at 211 n.1; *see Bowen*, 487 U.S. at 915-916 (Scalia, J., dissenting). Thus, if parents wanted to alter the terms of a child's IEP, they could file a Rehabilitation Act claim seeking damages for injuries allegedly caused by the IEP's provisions. Or, if parents wanted their child's school to pay for a tutor to provide remedial education, they could ask for damages for educational injuries caused by a school practice they opposed. *See, e.g.*, *CTL ex rel. Trebatoski* v. *Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014) (Rehabilitation Act claim for tuition reimbursement).

Congress did not intend section 1415(*l*) to be a hollow formalism. It took care to ensure that "disagreements" over the education of children with disabilities, Senate Report 15, would be resolved, whenever possible, by "state and local educational agencies" working "in cooperation with the parents or guardian of [a] child," rather than by judges in the context of adversarial litigation. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 208 (1982). And it sought to guarantee that, if courts must resolve a dispute over what benefits a child with a disability or her family should receive, they would have the aid of a detailed factual record, compiled by expert educational officials through a fair and impartial hearing. *See id.* at 206 (stating that Congress intended courts to have the benefit of "the records of [IDEA] administrative proceedings" and to give "due weight * * * to those proceedings"). Section 1415(*l*) should therefore be interpreted, as its plain text instructs, to require plaintiffs to exhaust any claim "seeking relief"—however described—"that is also available under [the IDEA]."

3. Every circuit that has interpreted section 1415(*l*) has concluded that the form of relief a plaintiff seeks is immaterial, and Congress has acquiesced in that interpretation

In the thirty years since Congress enacted section 1415(*l*), no fewer than nine circuits have interpreted the provision's exhaustion requirement. Without exception, every one has rejected the contention that the statute's application turns on the form of a plaintiff's prayer for relief—a consensus Congress declined to disturb when it reenacted section 1415(*l*) in 2004.

The Ninth Circuit has expressed this view with particular clarity. In *Payne* v. *Peninsula School District*—the same decision petitioners offer as an exemplar of their formalistic approach, Pets. Br. 24—that court held that "exhaustion is clearly required when a plaintiff seeks an IDEA remedy *or its functional equivalent*." 653 F.3d 863, 875 (9th Cir. 2011) (en banc) (emphasis added). Consequently, it explained, plaintiffs "cannot avoid exhaustion through artful pleading." *Id.* at 877. For instance, plaintiffs cannot bring unexhausted claims seeking damages for "the cost of counseling, tutoring, or private schooling," as that "relief [is] available under the IDEA" in the form of compensatory education. *Id.* Nor can plaintiffs go straight to court to "request[] damages to compensate for costs associated with unilaterally altering a disabled student's educational placement," because that relief can be obtained under the IDEA as retroactive reimbursement. *Id.*

Other circuits have likewise looked to the substance rather than the form of relief in applying

section 1415(*l*). The Second Circuit held that plaintiffs could not obtain an injunction granting their child "permission to bring [a] service dog to school" because "[t]he relief [they] seek * * * 'is *in substance* a modification of [their child's] IEP.'" *Cave* v. *E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008) (citation omitted; emphasis added); *see also Polera*, 288 F.3d at 487-488. The Seventh Circuit (per Judge Easterbrook) held that plaintiffs could not sue for damages "to pay for services (such as counseling) that will assist [their child's] recovery of self-esteem and promote his progress in school" because "school district[s] may be able (indeed, may be obliged) to provide these services in kind under the IDEA." *Charlie F* v. *Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996); *see also Perez* v. *Wis. Dep't of Corr.*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) ("[A] school board's ability to provide services in kind—that is, to provide money's worth—mean[s] that it [i]s impossible to draw a bright line between damages and other relief."). The Third, Eighth, and Tenth Circuits have applied similar reasoning.[7]

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[7] *See J.B.* v. *Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 592-594 (8th Cir. 2013) (concluding that parents could not bring an unexhausted claim for "money damages" to "pay for education-related expenses" because the same relief was "available under the IDEA" in the form of "reimbursement for private educational services"); *Batchelor*, 759 F.3d at 277 (concluding that parents must exhaust a claim for "monetary damages" because "such an award may * * * be granted [under the IDEA] as reimbursement for certain expenses incurred"); *Ellenberg* v. *N.M. Military Inst.*, 478 F.3d 1262, 1280 (10th Cir. 2007) (holding exhaustion necessary because "the thrust of the relief

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At times these courts—as well as the other circuits that have interpreted section 1415(*l*)'s exhaustion requirement—have used a broader formulation, saying that section 1415(*l*) requires exhaustion whenever a complaint "allege[s] injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *S.E.* v. *Grant Cty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008) (citation omitted); *see Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 61 (1st Cir. 2002); *Babicz* v. *Sch. Bd. of Broward Cty.*, 135 F.3d 1420, 1422 n.10 (11th Cir. 1998) (per curiam); Pet. App. 6. To the extent this standard would force a plaintiff to exhaust claims seeking relief that is *not* in substance available under the Act, it goes too far. As explained above, section 1415(*l*) turns on the substance of the "relief" the plaintiff "seek[s]," not the nature of the injury alleged.

Nonetheless, this test should typically lead to the same results as a straightforward substance-over-form construction of section 1415(*l*)'s text. That is because whenever plaintiffs seek relief for injuries caused by a school's failure to provide an accommodation for a child with a disability, it is highly probable that awarding that relief would invalidate or alter the child's IEP—a type of relief unquestionably "available under [the IDEA]." *See Cave*, 514 F.3d at 248. Likewise, when a plaintiff seeks compensatory damages to remedy an educational injury, it is likely that some of those damages will in substance be identical to the award of retroactive reimbursement

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the [plaintiffs] requested under § 504 could be obtained through the IDEA").

or compensatory education. *See Charlie F.*, 98 F.3d at 992.

Thus, since Congress enacted section 1415(*l*), *no* circuit has construed the word "relief" to refer to the form of what a plaintiff seeks. And Congress appears to have acquiesced in that position. In 2004, against the backdrop of the circuits' consensus, it reenacted section 1415(*l*) without change. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2730. Had Congress disagreed with the uniform position of the lower courts, it could easily have overridden that position—much as it overrode the Court's interpretation in *Smith* when it enacted section 1415(*l*). Congress's decision to leave the statute untouched suggests that it agreed that section 1415(*l*) should not turn on the form of relief a plaintiff requests. *See Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005) (stating that "congressional ratification" is presumed when Congress "reenact[s] [a statute] without change" in the face of a "broad and unquestioned" "judicial consensus"); *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 594 (2004) ("[C]ongressional silence after years of judicial interpretation supports adherence to the [consensus] view.").

B. Petitioners' And The Government's Formalistic Reading Of Section 1415(*l*) Is Unsupported By Text, Precedent, Or Purpose

Petitioners and the Government contend that section 1415(*l*) is concerned with form alone. They argue that plaintiffs are categorically exempted from exhaustion when they phrase a request for relief in

terms of damages. And they suggest that plaintiffs can opt out of the IDEA's procedures either by declining to argue or by conceding that a challenged practice does not violate the IDEA. Each limit would eviscerate section 1415(*l*)'s exhaustion requirement, and neither is supported by its text.

1. Requests for damages are not categorically exempt from section 1415(*l*)'s exhaustion requirement

a. Petitioners and the Government start with the argument that section 1415(*l*) *never* requires exhaustion of claims for compensatory damages. *See* U.S. Br. 16, 18; Pets. Br. 16, 18-19. They reach this bright-line rule by way of a deceptively attractive syllogism: section 1415(*l*) mandates exhaustion only when a plaintiff "seek[s] relief that is also available under [the IDEA]"; the IDEA does not authorize relief in the form of compensatory damages; hence, requests for compensatory damages cannot be "seeking relief" available under the IDEA. *See* U.S. Br. 16; Pets. Br. 18.

Conspicuously absent from this argument is any explanation of why the term "relief" should be construed to refer to the form and not the substance of what a plaintiff seeks. The word itself does not require it; its "familiar meaning" is "any redress or benefit provided by a court," *Denedo*, 556 U.S. at 909 (internal quotation marks omitted), and the IDEA plainly makes available many of the same "benefit[s]"—including money—that plaintiffs may seek in the form of compensatory damages. *See, e.g.*, *Burlington*, 471 U.S. at 363; *Streck*, 408 F. App'x at 415. Nor is such an interpretation supported by precedent—on the contrary, as described above, the Court

has consistently construed the term "relief" to refer to the "substance" and not the form of the benefit a plaintiff seeks. *See, e.g.*, *Great-West*, 534 U.S. at 210; *Blue Fox*, 525 U.S. at 262.

Indeed, the Government itself has previously cautioned against assigning talismanic significance to the formulation of a claim as one for "money damages" rather than "equitable relief." In *Bowen*, it told this Court that because "[*e*]*very* complaint seeking the recovery of money could be framed as a request for an 'injunction,'" the determination of whether a plaintiff seeks "relief other than money damages" under the APA must turn on whether "those complaints *in substance* do not seek 'money damages,'*** not because of the way in which the complaints have been drafted." U.S. Br. 22-23, *Bowen*, *supra* (Nos. 87-712, 87-929) (second emphasis added). The Court accepted that substance-over-form approach to construing the statute. *See Bowen*, 487 U.S. at 901 (considering "the *nature* of the relief sought" (emphasis added)); *Blue Fox*, 525 U.S. at 261-262 (explaining that "*Bowen's* analysis*** did not turn on distinctions between 'equitable' actions and other actions" but on "the substance of the State's suit"). It is surprising, then, that the Government now claims that *Bowen* lends support to its newfound view that "the specific forms of relief requested in the complaint" control. U.S. Br. 17 The Government urged this Court to bar plaintiffs from using "formalistic device[s]" to evade the APA's restrictions, U.S. Br. 10, *Bowen*, *supra* (Nos. 87-712, 87-929); there is no reason those devices should be allowed for section 1415(*l*).

Petitioners look to *Montanile* to support their formalistic construction of the statute. Pets. Br. 27

But this too gets things backwards. In *Montanile*, this Court did not simply accept the plaintiffs' characterization of "the remedy sought" as "legal," as petitioners suggest. 136 S. Ct. at 658. Rather, consistent with its general practice in ERISA cases, the Court closely examined the plaintiffs' request for an "equitable lien" to determine whether the relief they sought was in fact "equitable *in nature*." *Id.* at 657 (emphasis added).

Casting about for some authority aligned with its proposed construction, the Government cites Federal Rule of Civil Procedure 8(a)(3), which requires plaintiffs to specify "the relief sought" in a complaint. *See* U.S. Br. 16. Yet this instruction provides no answer to the question whether it is the *substance* or the *form* of the relief that matters. If anything, Rule 8 suggests the former: it states that "[p]leadings must be construed so as to do justice," Fed. R. Civ. P. 8(e)—a requirement that, "[a]t base, * * * command[s] [courts] never to exalt form over substance." *Phillips* v *Girdich*, 408 F.3d 124, 128 (2d Cir. 2005).

The Government also asserts that a claim for damages cannot be seeking relief "available under [the IDEA]" because damages are a legal rather than equitable remedy, and a court's authority to grant relief under the IDEA is equitable. U.S. Br. 18. But the characterization of a remedy as legal rather than equitable does not affect the substance of the "redress or benefit" the plaintiff seeks. Money paid as "compensation" for private educational expenses is no different than money paid as "reimbursement" for those expenses. *Burlington*, 471 U.S. at 370. In either case, the upshot is the same: the plaintiff is made whole and the defendant writes a check. The

Government offers no reason why this label matters under section 1415(*l*).[8]

The Government's position here is all the more baffling since it previously argued that a request for compensatory damages should *not* inoculate plaintiffs from section 1415(*l*)'s exhaustion requirement. In its brief in *Payne*, the Government told the *en banc* Ninth Circuit that plaintiffs cannot "challenge an ongoing IDEA-related practice without proper exhaustion simply by requesting only compensatory damages" because "[o]btaining such damages requires a judicial declaration" that the child's IEP is unlawful, a type of relief that is "available under the IDEA." U.S. Br. 22, *Payne*, *supra* (No. 07-35115); *see also Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 107 (1981) (noting that an award of damages would "require a federal-court declaration" that the challenged conduct violated plaintiffs' rights).[9] The Ninth Circuit agreed, ex-

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[8] Nor does it matter for purposes of section 1415(*l*) whether a sought-after remedy is better characterized as "legal" or "equitable." The Court engaged in that inquiry in its cases applying ERISA and the APA because the statutory text required it. *See* 29 U.S.C. § 1132(a)(3) (allowing only "equitable relief"); 5 U.S.C. § 702(a) (permitting only "relief other than money damages"). In contrast, section 1415(*l*) asks whether a plaintiff seeks "relief that is also *available* under [the IDEA]." This inquiry thus does not turn on the characterization of the relief as "legal" or "equitable," but on whether that relief may in substance be "obtained"—and "practically speaking," at that, *Ross*, 136 S. Ct. at 1859—under the statute.

[9] As the Government implicitly acknowledged elsewhere in the same brief, there is no actual requirement that the practice be "ongoing." The IDEA offers a range of remedies, from reimbursement to compensatory education, to address *past*

plaining that "exhaustion is clearly required when a plaintiff seeks an IDEA remedy *or its functional equivalent*." *Payne*, 653 F.3d at 875 (emphasis added); *see id.* at 877. Although the Government has inexplicably abandoned that position as well, it remains correct, and belies the contention that a claim for money damages is categorically exempt from exhaustion under section 1415(*l*).

b. Petitioners and the Government both make much of the fact that section 1415(*l*) uses "different language" than the PLRA. Pets. Br. 32; U.S. Br. 20, 24-25. True enough: the PLRA requires exhaustion whenever *any* "administrative remedies * * * are available" to redress a plaintiff's injury, 42 U.S.C. § 1997e(a), whereas section 1415(*l*) requires exhaustion only when the IDEA makes available the "relief" the plaintiff is "seeking," 20 U.S.C. § 1415(*l*). Contrary to petitioners' and the Government's suggestion, however, that distinction is entirely consistent with the "familiar meaning" of the tem "relief" as the *substance* of the "redress" a plaintiff seeks. *Denedo*, 556 U.S. at 909. If the IDEA's administrative procedures cannot provide the plaintiff the relief she requests *in any form*, then section 1415(*l*) does not require exhaustion, even if the IDEA could in theory redress the plaintiff's injury in some other way.

Thus, for example, section 1415(*l*) typically would not require a plaintiff to exhaust IDEA procedures before seeking damages to compensate for pain and suffering or medical expenses incurred as a result of discrete instances of past abuse. *Cf. Payne*, 653 F.3d

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IDEA-related misconduct. *See* U.S. Br. 23-24, *Payne*, *supra*, (No. 07-35115); *Burlington*, 471 U.S. at 370.

at 883 (suggesting that excessive force and unlawful confinement claims seeking "general damages for extreme mental suffering and emotional distress" would not be subject to exhaustion); *F.H. ex rel. Hall* v. *Memphis City Schs.*, 764 F.3d 638, 644 (6th Cir. 2014) (holding that a plaintiff need not exhaust a section 1983 claim seeking damages for "verbal, physical, and even sexual abuse"). An award of damages in such a case would presumably not implicate the validity of the child's IEP. *See Muskrat* v. *Deer Creek Pub. Schs.*, 715 F.3d 775, 786 (10th Cir. 2013). Nor would the child be able to obtain any part of the monetary relief requested through IDEA procedures. Section 1415(*l*) would therefore not require exhaustion, even if a hearing officer could conceivably award the plaintiff other appropriate relief that she did *not* request, such as an order requiring "training of * * * school district personnel" or a prospective change in educational placement. Zirkel, *supra*, at 411, 417-418. By contrast, the PLRA requires exhaustion of a claim for money damages for past abuse "*regardless* of the fit between [the] prayer for relief and the administrative remedies possible." *Booth*, 532 U.S. at 739 (emphasis added).

Nor are instances of past abuse the only circumstances in which section 1415(*l*) does not require exhaustion. Parents also do not need to pursue administrative remedies where they complain of laws or policies IDEA administrators are powerless to review. For example, some courts have excused exhaustion in suits alleging "systemic issues" such as a State's "total failure to prepare and implement IEPs" for eligible children. *Handberry* v. *Thompson*, 446 F.3d 335, 343-344 (2d Cir. 2006) (brackets and

citation omitted); *Beth V. ex rel. Yvonne V.* v. *Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (suit challenging "sufficiency of the state's complaint procedures"); *see also* Ill. & Minn. Am. Br. 10-11. Reading section 1415(*l*)'s exhaustion requirement to turn on the substance of a plaintiff's prayer for relief thus faithfully preserves the important limits Congress placed on its scope.

2. Plaintiffs must exhaust claims seeking relief available under the IDEA even if they do not allege that the challenged conduct violated the IDEA

At several points, petitioners suggest that exhaustion is not required under section 1415(*l*) if plaintiffs do not allege that the conduct they challenge violated the IDEA, or do not argue that their child was deprived of educational benefits. *See* Pets. Br. 18-19, 31, 43-44, 47. That argument is wrong.

The requirement of exhaustion under section 1415(*l*) turns on what relief a plaintiff seeks, not why he seeks it. If the plaintiff asks for some "redress or benefit," *Denedo*, 556 U.S. at 909, "available under [the IDEA]" in substance, then exhaustion is required regardless of the plaintiff's legal theory.

Petitioners' argument would rewrite the statute. The whole purpose of section 1415(*l*)—evident on its face—is to address claims brought under *other* statutes. That is why the statute says that plaintiffs "seeking relief that is also available under [the IDEA]" must exhaust IDEA procedures "before the filing of a civil action under" "the Constitution, the [ADA], title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). The HCPA's

drafters thus intended section 1415(*l*) to capture actions that "*could* have been brought under [the IDEA]"—not just those that actually invoke it. Senate Report 12 (emphasis added). But under petitioners' reading of the statute, exhaustion would apply only when a plaintiff "fil[es] a civil action" invoking *both* the IDEA *and* another statute. That is not what Congress said.

Once again, the Government previously embraced that view. In *Payne*, it told the *en banc* Ninth Circuit that exhaustion is required whenever a plaintiff "'seek[s] relief that is also available under'" the IDEA, "no matter what legal theory is used" and "regardless of whether the claim is pleaded under another law." U.S. Br. 22-23, *Payne*, *supra* (No. 07-35115). Accordingly, it explained, if a request for relief "'*could* have been brought under' the IDEA," parents may not attempt to "short-circuit the IDEA process by going to court prematurely." *Id.* at 22 (quoting Senate Report 12).

While the Government has not explicitly acknowledged abandoning that position here, it now appears to endorse a different path by which a plaintiff could short-circuit the IDEA process: by "expressly conced[ing] that the defendant's conduct did not violate the IDEA." U.S. Br. 18. "In such circumstances," the Government argues, "the concession makes clear that there is no dispute that the child at issue received a FAPE, and thus that there is no available remedy under the IDEA." *Id.*

The Court need not address this issue. As the Government acknowledges, its argument is "not directly implicated by petitioners' question presented." *Id.* Nor is there any indication in the record that peti-

tioners actually made such a concession in this case. Nonetheless, the Government is wrong. A concession that a defendant has not violated the IDEA does not mean relief is unavailable under the IDEA. For one thing, the plaintiff may simply have foregone a valid claim. And even if a plaintiff might not, for any number of reasons, ultimately prevail in obtaining the relief he seeks through the administrative process, that does not mean he can opt out of exhaustion. Section 1415(*l*) asks only whether the relief the plaintiff seeks is "available." And relief is "available" so long as an IDEA hearing officer can award it. *See Ross*, 136 S. Ct. at 1858-59. The statute leaves the question of whether that relief *should* be awarded to the "elaborate and highly specific procedural safeguards" Congress designed for that purpose. *Rowley*, 458 U.S. at 205. Parents may not "circumvent" that process by making their own determination that IDEA procedures would be ineffective or insufficient. Senate Report 15.

3. Petitioners' arguments from legislative history and policy are unpersuasive and irrelevant

Petitioners and the Government argue that their formalistic reading of section 1415(*l*) follows from the statute's purpose. Because Congress sought to overrule *Smith* and reaffirm the availability of other statutes as "separate vehicles for ensuring the rights of handicapped children," the argument goes, it must have meant to let "a plaintiff [who] does *not* seek IDEA relief" proceed immediately to court. U.S. Br. 26-27 (emphasis added); *see* Pets. Br. 36-37. Fair enough. But that just begs the question, yet again, what it means to "seek IDEA relief." Neither peti-

tioners nor the Government can point to any evidence in the legislative history that Congress intended to abandon the "familiar meaning" of the term "relief" in section 1415(*l*) or to invert the ordinary substance-over-form approach to interpreting complaints. *Denedo*, 556 U.S. at 909.

In any event, Congress's desire to overrule *Smith* explains only the first half of section 1415(*l*). Congress chose not to stop there. Instead, it added a proviso that made clear that other remedies must coexist with the IDEA's comprehensive scheme.

Petitioners insist that this proviso should be narrowly construed. As evidence, they cite a failed proposal floated in committee hearings in the House and Senate that would have limited non-IDEA remedies to cases where the IDEA does not apply at all. *See Handicapped Children's Protection Act: Hearing on H.R. 1523 Before the Subcomm. on Select Educ. of the H. Comm. on Educ. & Labor*, 99th Cong. 27 (1985) (statement of Jean Arnold, Nat'l School Bd. Ass'n); Pets. Br. 34-35 & n.8. But Congress's decision not to cut off other rights and remedies in cases covered by the IDEA does not imply that it abandoned the "elaborate set" of "procedural safeguards" Congress designed to ensure "proper resolution of substantive disagreements" regarding the education of children with disabilities. *Burlington*, 471 U.S. at 368; Senate Report 15. Allowing plaintiffs to avoid that process based purely on the *form* of relief sought would undermine the legislative judgment that administrative proceedings are the proper forum to address complex matters of educational policy in the first instance. *See Rowley*, 458 U.S. at 208. And it would give litigants an easy end-run around the exhaustion provision Congress crafted.

With no sure footing in the legislative history, petitioners and the Government fall back on policy concerns. But their arguments once again presuppose that administrative proceedings are "incapable of resolving the actual dispute at hand." U.S. Br. 27; *see* Pets. Br. 41 (characterizing administrative proceedings as "time-consuming and futile"). That is simply not the case where the IDEA offers the relief the plaintiff seeks in substance.

Furthermore, while there may be situations where a plaintiff ultimately cannot show she is entitled to administrative relief, even though her claims support an award of damages in subsequent civil litigation, that does not make exhaustion "pointless." U.S. Br. 30. Complaints that seek relief available in substance under the IDEA will necessarily require scrutiny of the "special education and related services" offered to the child in question. 20 U.S.C. § 1401(9) (defining a FAPE). The factual record developed by an educational expert in such a case is likely to be useful to a generalist court.

And there is scant evidence that such proceedings impose undue "costs and delay." Pets. Br. 42; *see* U.S. Br. 27 The IDEA provides that parents may obtain attorneys' fees incurred during administrative proceedings. *See* 20 U.S.C. § 1415(i)(3)(B)(i). So prevailing plaintiffs can recover at least some of the expenses of exhaustion. And although petitioners cite commentators for the proposition that IDEA procedures are slow-moving, the statute and accompanying regulations set a tight timeline. *Compare* Pets. Br. 38-41 *with* 20 U.S.C. § 1415(f)(1)(B)(ii) (hearing to take place within 30 days of filing a complaint); 34 C.F.R. § 300.515(a) (decision due within 45 days of hearing); *id.* § 300.515(b) (adminis-

trative appeal to conclude within 30 days of request). A recent study by the Government Accountability Office (GAO) found that more than half of the decisions in due process hearings issued within the 45-day timeline. GAO, *Special Education: Improved Performance Measures Could Enhance Oversight of Dispute Resolution* fig. 6, at 25 (Aug. 2014). In sum, petitioners can identify no policy that would justify abandoning this Court's established practice of looking to the "essence" of the relief a plaintiff seeks when applying section 1415(*l*). *Papasan*, 478 U.S. at 278.

II. PETITIONERS WERE REQUIRED TO EXHAUST THEIR CLAIMS

Because section 1415(*l*) bars plaintiffs from going straight to court to obtain relief, however styled, that is also available under the IDEA, courts must carefully scrutinize complaints to determine what "redress or benefit[s]" they actually seek. As all parties agree, this inquiry must focus solely on what the "civil action * * * seek[s]"—that is, on what the *complaint* requests—not on the parties' extrinsic statements or private objectives. 20 U.S.C. § 1415(*l*); *see* Pets. Br. 23-24; U.S. Br. 16.

In conducting this inquiry, courts must deem a complaint to "seek[]" any remedy that is fairly encompassed within its prayer for relief—regardless whether that prayer is phrased broadly or narrowly. This follows as a matter of ordinary complaint construction: Rule 8(a)(3) "does not require that the demand for judgment be pled with great specificity," and courts regularly deem plaintiffs to "seek[] an[y] award" that falls within the corners of their remedial demands. *Sheet Metal Workers Local 19* v. *Keystone*

Heating & Air Conditioning, 934 F.2d 35, 40 (3d Cir. 1991) (citing 5C Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1255 (2d ed. 1990)). It also makes sense; otherwise, plaintiffs could file unexhausted claims for relief available under the IDEA simply by framing their prayers for relief in broad terms that do not specifically identify relief the IDEA provides.

Under the foregoing standards, each of petitioners' claims must be dismissed for failure to exhaust. Petitioners' complaint seeks at least three categories of relief—not including attorneys' fees—that are also available under the IDEA. It seeks monetary relief that would include reimbursement for the costs of both E.F.'s homeschooling and future compensatory education. It seeks a declaratory judgment that would effectively determine that a component of E.F.'s IEP is unlawful and must be changed. And it asks for "all other appropriate relief"—a broad request that must be construed to seek each of the foregoing remedies, as well as any number of other forms of relief the IDEA makes available.

A. Petitioners' Complaint Seeks Monetary Relief Available Under The IDEA

Petitioners' complaint first asks that the court "[a]ward her damages in an amount to be determined at trial." Resp. App. 21. The complaint does not specify how the damages should be calculated or what they would compensate for. Accordingly, this request "seeks" any damages a jury might "[a]ward" on the basis of the allegations in the complaint. And at least two types of damages the jury might award would be identical in substance to monetary relief petitioners could obtain under the IDEA.

First, the complaint pleads allegations that, if established, could support an award of "retroactive reimbursement" for private education costs petitioners allegedly incurred because of the conduct they challenge. *Burlington*, 471 U.S. at 370. Specifically, the complaint alleges that "[a]s a result" of respondents' failure to "recognize Wonder as a service dog," E.F.'s parents "removed [E.F.] from Ezra Eby Elementary School" and homeschooled her for two years. Resp. App. 9. Petitioners allege that they used "an online curriculum" during this time, and that E.F.'s mother "took on the added educational responsibilities," a role the complaint describes as "challenging and frustrating" because of her lack of "training." Resp. App. 9-10.

If petitioners prevailed in court, a jury could award damages for all of these homeschooling costs: the expense of supplies, the tuition paid for the online curriculum, the time spent educating E.F., and any lost wages. *See, e.g.*, *CTL*, 743 F.3d at 528 (awarding tuition reimbursement in Rehabilitation Act suit). The IDEA authorizes the same relief in all but name. It empowers hearing officers to "order school authorities to reimburse parents for their expenditures on private special education for a child." *Burlington*, 471 U.S. at 369. The Department of Education has explained that homeschooling should be treated just like any other private placement under the IDEA if "the State recognizes home schools * * * as private elementary schools," which Michigan does. 71 Fed. Reg. 46,540, 46,594 (Aug. 14, 2006); *see* Mich. Comp. Laws § 380.1561(3)(a), (f), (4). Thus, a hearing officer could award petitioners monetary compensation for their out-of-pocket costs, as well as for the time they spent educating E.F. *See J.B.*, 721 F.3d at 593-594

(stating that a hearing officer may award "reimbursement of tuition" as well as other "private educational services"); *Bucks Cty. Dep't of Mental Health/Mental Retardation* v. *Pennsylvania*, 379 F.3d 61, 68-69 (3d Cir. 2004) (concluding that parents may be "paid for [their] time").

Second, petitioners' complaint contains allegations that would support the award of monetary relief for "compensatory education"—another remedy squarely within the authority of a hearing officer. *See, e.g.*, *Reid*, 401 F.3d at 523. In particular, the complaint describes numerous respects in which respondents' conduct allegedly harmed E.F.'s educational development. It states that by failing to recognize Wonder as a service dog, respondents "interfere[d] with [E.F.]'s ability to form a bond with Wonder" and "compromised Wonder's ability to effectively assist [E.F.] outside of school," thereby impairing her ability to "develop independence and confidence" and "bridge social barriers." Resp. App. 7, 11; *see* Resp. App. 8. It alleges that during E.F.'s homeschooling she was deprived of a teacher with "specific training in teaching methods that [she] required." Resp. App. 10. And it alleges that while E.F. was homeschooled, and later when respondents allegedly caused her to leave Ezra Eby Elementary, E.F. was "deni[ed] * * * the opportunity to interact with other students at" that school or "with children her own age." Resp. App. 11.

Were petitioners to prevail in their suit, a jury would presumably award them monetary relief to remedy each of these harms. Thus, petitioners would be compensated for the alleged injuries to E.F.'s "independence," the harms to her social development, and the temporary loss of a teacher with

"training in teaching methods that [E.F.] required." In practical terms, these damages would likely be measured by the costs of tutoring, therapy, and similar assistance designed to help E.F. make up for the progress she lost. *See Charlie F.*, 98 F.3d at 992.

Petitioners could obtain substantially the same monetary award under the IDEA. Each of the injuries petitioners allege—to E.F.'s independence, her socialization, and her scholastic education—is of a type the IDEA is designed to prevent. A core purpose of the statute is to "prepare [children with disabilities] for * * * *independent* living," 20 U.S.C. § 1400(d)(1)(A) (emphasis added), and the Act's enabling regulations require schools to provide an array of services to foster independence, *see, e.g.*, 34 C.F.R. § 300.39(b)(4) (discussing "travel training"); *id.* § 300.34(c)(6)(ii)(B) (describing occupational therapy intended to "[i]mprov[e] [a child's] ability to perform tasks for independent functioning"). Other IDEA provisions are concerned with children's social development. *See* 20 U.S.C. § 1401(3)(B)(i) (defining "delays * * * in * * * social or emotional development" as a disability for children between the ages of 3 and 9); 34 C.F.R. § 300.34(a), (c)(14) (defining "related services" to include "social work services" such as "[g]roup and individual counseling with the child and family"). And E.F.'s alleged loss of a teacher with "specific training in teaching methods that [she] required" closely tracks the statutory guarantee of "specially designed instruction * * * to meet the unique needs of a child." 20 U.S.C. § 1401(29) (defining "special education").

Thus, a hearing officer might award petitioners "compensatory education," in the form of either money or services, to address each of their alleged

injuries. *Reid*, 401 F.3d at 522-523; *see, e.g.*, *Streck*, 408 F. App'x at 415 (monetary award for compensatory education); *Ferren C.* v. *Sch. Dist. of Phil.*, 612 F.3d 712, 720 (3d Cir. 2010) (same). That might include money to pay for "educational services [E.F.] should have received in the first place"—such as tutoring or remedial training with her service dog. *See Batchelor*, 759 F.3d at 277 n.12. It might also include money for services—such as therapy—that would "place [E.F.] in the same position [she] would have occupied but for the school district's" alleged failures. *Reid*, 401 F.3d at 518; *see B.D.* v. *Dist. of Columbia*, 817 F.3d 792, 798-799 (D.C. Cir. 2016) (award must both make up for what school failed to provide and remedy the injury caused by that failure). These monetary awards might well be the same in substance as all or part of what petitioners ask for in their complaint.

Petitioners disagree, asserting that the only thing for which their complaint seeks compensation is "social and emotional harm," and that it therefore "does not allege any harm to E.F.'s education or any ongoing harm to her development * * * redressable in the IDEA proceedings." Pets. Br. 44; *see id.* at 18, 49. But counseling services for social and emotional problems are an available remedy under the IDEA. *See* 34 C.F.R. § 300.34(a) (defining "related services" to include "corrective" services such as "psychological services" and "counseling services"); *see id.* § 300.34(c)(10)(v). And, in any event, that characterization of petitioners' complaint is incomplete at best; as noted, petitioners also allege harms to E.F.'s independence, socialization, and her education that unquestionably are redressable under the IDEA.

B. Petitioners' Complaint Effectively Seeks A Judgment Declaring E.F.'s IEP Invalid And Requiring That It Be Modified

Petitioners' complaint also asks for "a declaration stating that [respondents] violated [E.F.'s] rights under Section 504 of the Rehabilitation Act" and "Title II of the [ADA]." Resp. App. 21. (As explained, *supra* pp. 35-36, petitioners' claim for damages necessarily entails a similar request.) According to the complaint, respondents violated E.F.'s rights under each statute by "refus[ing] to allow Wonder to act as a service dog for [E.F.] and to permit his access in the instructional setting." Resp. App. 15; *see* Resp. App. 17-18 (similar). And, as the complaint further recites, respondents effected that refusal by denying petitioners' request to include Wonder in E.F.'s IEP. Resp. App. 8.

Petitioners thus seek, in effect, a declaration that respondents improperly excluded a service dog from E.F.'s IEP. More than that, they effectively demand a judicial determination that E.F.'s IEP *ought* to have provided for a dog. As the Sixth Circuit observed, if petitioners are right, then "developing a working relationship with a service dog should have been one of the 'educational needs that result from the child's disability' used to set goals in E.F.'s IEP." Pet. App. 13 (quoting 20 U.S.C. § 1414(d)(1)(A)(i)(II)).

That relief is plainly available under the IDEA. *See* Zirkel, *supra*, at 9 (explaining that a hearing officer's authority to declare an IEP unlawful is "undisputed"). The central purpose of the IDEA's due process procedures is, after all, to give parents a forum for challenging an IEP. *See Honig*, 484 U.S. at 311-12; *see also* 20 U.S.C. § 1415(f)(3)(E)(i). By

obtaining a declaratory judgment that E.F.'s IEP was unlawful, petitioners would obtain the very remedy IDEA procedures were designed to provide.

Moreover, that declaratory judgment would in turn compel the District to *modify* E.F.'s IEP—yet another form of relief the IDEA makes available. *See Burlington*, 471 U.S. at 370; Zirkel, *supra*, at 16 nn.67-68, 17. As explained above, although respondents entered a consent agreement in 2012 stating that E.F. could bring a service dog to school, Resp. App. 10, the district did not (and could not) unilaterally change E.F.'s IEP. *See Honig*, 484 U.S. at 311 (describing "the necessity of parental participation in * * * the development of the IEP"); 20 U.S.C. § 1414(d) (setting forth detailed procedures for modifying IEPs). The consent agreement specified instead that "[s]hould [E.F.] reenroll," her "IEP team [would] meet to identify steps to ensure [her] transition back to school and her receipt of a FAPE." J.A. 48-49. E.F. did not reenroll, and so the IEP was not changed. Resp. App. 10-11. Accordingly, a declaratory judgment that it is unlawful for the district to exclude E.F's service dog, would require a host of changes to E.F.'s IEP—concerning class schedules, accommodations for the dog's trainer, the role of the human aide, and so on. *See Cave*, 514 F.3d at 248 (describing how an order granting "permission to bring [a] service dog to school" would entail modifications to an IEP); Pet App. 49 (describing ways in which E.F.'s IEP would need to be changed). IDEA administrators are empowered (and uniquely well-equipped) to issue such an order, and so that relief, too, is "available under" the IDEA.

Petitioners object that the *purpose* of their suit is not to declare E.F's IEP unlawful, but only "to

redress the past social and emotional harm that E.F. experienced." Pets. Br. 44, 49. But petitioners' subjective intentions are irrelevant. Courts applying section 1415(*l*) must look at what the "civil action"—the complaint—is "seeking." That determination depends on the substance of the prayer for relief, not the motives plaintiffs promise lie behind them.

Petitioners also suggest that they could not obtain a modification of E.F.'s IEP through the administrative process because E.F. no longer attends respondents' schools. Pets. Br. 49. But there is no question that petitioners could have obtained relief when this dispute first arose. Indeed, the IEP *was* modified in response to their request that Wonder be allowed to accompany E.F. to school. Resp. App. 8. Petitioners explain they changed schools after nearly three years in order "to ensure that E.F. could most quickly and efficaciously vindicate her right to attend school with her service dog." Pets. Supp. Br. 5. Petitioners were free to make that choice, but voluntarily abandoning IDEA remedies does not make those remedies "[un]available"; if that were so, every plaintiff could avoid the exhaustion requirement simply by moving to another district or State and filing suit. *Cf.* Pt. III *infra* (noting that courts have declined to excuse exhaustion as "futile" in such cases). As explained above, *supra* pp. 39-40, section 1415(*l*) asks whether the "relief" the plaintiff "seek[s]" is available under the IDEA administrative process—it makes no difference that the plaintiff may not ultimately be entitled to that relief, whether that is because the plaintiff fails to state a claim, cannot prove her case, or voluntarily moots some aspect of the dispute.

C. Petitioners' Complaint Seeks Any Relief The Court Deems Appropriate

Finally, petitioners' complaint requests "any other relief this Court deems appropriate." Resp. App. 21. That request invokes the district court's broad remedial authority under Federal Rule of Civil Procedure 54(c), which provides that a "final judgment should grant the relief *to which each party is entitled*, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c) (emphasis added). Petitioners' complaint thus affirmatively demands all relief to which "[t]he nature of the claim and the governing law" entitle them under Rule 54(c). *Charlie F.*, 98 F.3d at 992. Insofar as the allegations in petitioners' complaint would support the award of relief available under the IDEA, then, they seek it—including not only retroactive reimbursement, compensatory education, and an order to modify E.F.'s IEP, but the whole array of other remedies the IDEA makes available for plaintiffs who challenge the adequacy of the services a school provides to a child with a disability.

The Government dismisses this request as "boilerplate." U.S. Br. 34. That would come as surprise to the countless litigants and courts that have relied on similarly broad language as the basis for seeking and awarding relief. *See, e.g.*, *Boxer X* v. *Donald*, 169 F. App'x 555, 559 (11th Cir. 2006) (per curiam); *Jerron West, Inc.* v. *State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1337 (9th Cir. 1997); *see generally* Wright, *supra*, at § 1255. Furthermore, the Government's position would allow a plaintiff to evade exhaustion just by phrasing a request for relief in broad terms. The better rule is to take the complaint

at its word, and require exhaustion whenever the complaint's demand encompasses "relief that is also available under [the IDEA]."

III. PETITIONERS WAIVED ANY EXCEPTION TO EXHAUSTION

In a last-ditch effort to avoid section 1415(*l*)'s exhaustion requirement, petitioners argue, for the first time in this litigation, that they need not exhaust their claims because doing so would be "futile." This claim is not properly before the Court, and in any event it is meritless.

To be sure, not every case that seeks relief available in substance under the IDEA must be addressed through the administrative process. This Court has recognized that there are situations "where exhaustion would be futile or inadequate" even where a plaintiff seeks relief under the Act itself. *See Honig*, 484 U.S. at 327; *Smith*, 468 U.S. at 1014 n.17 (noting the practice of lower courts). Congress incorporated those exceptions into section 1415(*l*), providing that exhaustion is required only "to the same extent" as if the action had been filed under the IDEA.[10]

That cannot help petitioners, however, because they waived any argument that their claims should be excused. As this Court has explained, "[t]he burden * * * to demonstrate the futility or inadequacy of administrative review" rests with the party seeking to avoid exhaustion. *Honig*, 484 U.S. at 327

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[10] Exhaustion would therefore be excused, for instance, under "exigent * * * circumstances" where administrative procedures are incapable of providing relief in time. *Honig*, 484 U.S. at 327; *see* Autism Speaks Am. Br. 4 (describing situations in which "every moment counts").

Petitioners never argued below that their claim for money damages or their decision to remove E.F. from respondents' school rendered the IDEA's procedures futile or inadequate. Pet. App. 17. And although the Sixth Circuit expressed doubts about whether petitioners could have met their burden, petitioners' waiver meant the court "[could] not decide whether the exhaustion requirement should be excused as futile." *Id.* Thus, to the extent petitioners suggest that this case turns on the futility or inadequacy of the procedures set forth under section 1415(f) and (g), those questions are not properly before this Court. *See, e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (the Court "ordinarily do[es] not decide in the first instance issues not decided below" (citation omitted)).

Realizing their predicament, petitioners ask this Court to hold that section 1415(*l*)'s proviso does not apply *at all* where resort to the IDEA's administrative process would be futile. *See* Pets. Br. 28-31. They argue that the words "seeking relief that is also available" "codified the futility principles excusing exhaustion when the administrative forum lacks power to grant the relief a plaintiff seeks in court." *Id.* at 35-36. They go so far as to suggest this means exhaustion is "[p]resumptive[ly]" not required where IDEA procedures cannot provide the form of relief a plaintiff seeks. *Id.* at 28 (in heading).

Petitioners are mistaken. *Honig* forecloses a "presumptive rule" that would excuse exhaustion. 484 U.S. at 327 (noting that "the burden in such cases, of course, rests with the" party seeking the exception). And the text of section 1415(*l*) cannot bear petitioners' interpretation.

There is no doubt that Congress intended to allow plaintiffs otherwise required to exhaust under section 1415(*l*) to benefit from the exceptions to exhaustion available in suits brought under the IDEA. But Congress fully embodied that intent by requiring exhaustion only "to the same extent as would be required had the action been brought" under the IDEA. 20 U.S.C. § 1415(*l*). If the words "seeking relief that is also available" screened out any claim for which administrative procedures would be futile or inadequate, then the "to the same extent as" language would add precious little. Petitioners' reading of the statute would thus render a portion of the statute "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *see TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). That is not what Congress meant. *See* Senate Report 15 (explaining that "to the same extent" meant that "[e]xhaustion of administrative remedies would thus be excused * * * when resort to those proceedings would be futile."); House Report 7 (noting that the House version of the HCPA would require exhaustion "where [it] would be required under the [IDEA]"). Petitioners cannot rewrite the statute to get around their failure to assert futility.

In any event, the futility exception would not get petitioners very far. Futility does not excuse exhaustion any time administrative procedures are unable to award the precise *form* of relief a plaintiff seeks. Rather, the Court has held that exhaustion is required if administrators can award "the *type* of relief requested." *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992); *see also id.* at 147 (stating that the agency must be "empowered to grant *effective relief*" (emphasis added; citation omitted)). For instance, in

McCarthy, the Court found exhaustion of the plaintiff's claim for "Money Damages Only" futile because administrators could not award "*any* monetary remedy"—even under a different statute than the one the plaintiff had invoked. *Id.* at 142, 154 & n.6 (emphasis added).[11] Likewise, in *Greene* v. *United States*, 376 U.S. 149 (1964), the Court held that it would be futile for a plaintiff denied a security clearance under a 1955 regulation to challenge that decision under a 1960 regulation "[i]n view of the *substantial* differences between the two regulations"; but it expressly clarified that it did "not suggest that a claimant, seeking damages under a former regulation, need not resort to administrative proceedings under a new regulation where the new regulation contains *essentially* the same substantive requirements as its predecessor." *Id.* at 163 (emphases added). The other cases cited by the Government are to similar effect. *See McNeese* v. *Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 674 (1963) (deeming exhaustion futile because administrative procedures did not offer a "remedy *sufficiently ade-*

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[11] Petitioners and the Government suggest that *McCarthy* stands for the proposition that where a plaintiff requests money damages, that is necessarily the *only* type of relief he seeks. Pets. Br. 31; U.S. Br. 17. It does not. The Court expressly acknowledged that there "may be * * * some instances" in which "there are other things" a plaintiff seeking monetary relief "wants." *McCarthy*, 503 U.S. at 154. It held only that it could not "presume, as a general matter," that a plaintiff who sought recovery for "discrete past wrongs" and "specifically request[ed] monetary compensation only" would be satisfied with exclusively injunctive relief. *Id.* This case is different: the administrative process is capable of awarding monetary relief, and petitioners do not seek monetary compensation alone.

quate" (emphasis added)); *Mont. Nat'l Bank of Billings* v. *Yellowstone Cty.*, 276 U.S. 499, 505 (1928) (deeming exhaustion futile because the administrator "was powerless to grant *any appropriate relief*" (emphasis added)).

Nor have courts permitted plaintiffs for whom administrative remedies were available at the time of the alleged wrongdoing to avoid exhaustion by waiting until their relationship with the defendant school was at an end to sue. *See, e.g.*, *Polera*, 288 F.3d at 490; *M.P. ex rel. K.* v. *Indep. Sch. Dist. No. 721*, 326 F.3d 975, 981 (8th Cir. 2003); *Cudjoe* v. *Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002); *N.B. ex rel. D.G.* v. *Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (per curiam) ("If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory."). The record in this case shows that petitioners waited some three years from the time respondents first refused to allow E.F. to bring her dog to school before they enrolled her in another district. *See* Resp. App. 7-8, 10. That was ample time to let administrative proceedings run their course. Thus, even if the Court were inclined to reach the question whether petitioners may be excused from section 1415(*l*)'s requirement—which it should not do—that claim would fail.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

TIMOTHY J. MULLINS
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084

NEAL KUMAR KATYAL
Counsel of Record
EUGENE A. SOKOLOFF
MITCHELL P. REICH*
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

* Admitted only in New York; supervised by members of the firm.

Attorneys for Respondents

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In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

October 20, 2016

Becker Gallagher Cincinnati, OH · Washington, D.C. · 800.890.5001

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The Sixth Circuit specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17. It nonetheless held that Petitioners were required to exhaust IDEA proceedings because they "*could have* used IDEA procedures to remedy" the "core harms that [they] allege" in this lawsuit. Pet. App. 6 (emphasis added). Respondents urged the Sixth Circuit to adopt that holding, and they defended that holding at the petition stage.

The Sixth Circuit's holding flatly contradicts the text of the Handicapped Children's Protection Act (HCPA). That text requires exhaustion only when the plaintiff is *actually* "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*)—not simply when the plaintiff experienced an injury for which he or she *could have sought* relief under the IDEA. The HCPA's text thus adopts a "relief-centered," rather than an "injury-centered," rule. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011), cert. denied, 132 S. Ct. 1540 (2012); Pet. Br. 20-27. The plain meaning of the text finds support in basic administrative law principles and the legislative history. Pet. Br. 28-43.[1]

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[1] Respondents misquote the legislative history. They quote Senator Simon as stating that "'parents are required to exhaust the [IDEA's] administrative remedies' if '[a] suit *could have been filed* under the [IDEA].'" Resp. Br. 26 (quoting 131 Cong. Rec. S10,400-S10,401 (daily ed., July 30, 1985); emphasis and alterations in Respondents' brief). Respondents' brackets are carefully placed. Senator Simon did not say that exhaustion was required if "a" suit could have been filed under the IDEA. He said that "[w]hen parents choose to file suit under another law that protects the rights of handicapped children," exhaustion is required "if *that suit* could have been filed under the Education for the Handicapped Act." 131 Cong. Rec. S10,400 (emphasis added).

Respondents now concede that the Sixth Circuit's holding "goes too far." Resp. Br. 30. They acknowledge that the HCPA requires exhaustion only when the plaintiff's action actually seeks relief that is also available under the IDEA. But, they argue, what matters is substance and not form—if the action seeks relief that is available *in substance* under the IDEA, Respondents contend that the HCPA requires exhaustion.

Respondents gain no ground with their eleventh-hour form-versus-substance argument. Whether one looks at the matter formally or substantively, the IDEA does not authorize disabled children to recover emotional distress damages—monetary payments to compensate for, rather than prospectively counteract, a past social or emotional harm. An ADA or Rehabilitation Act action seeking emotional distress damages thus seeks relief that is not available under the IDEA in form or substance.

Petitioners have never sought, and do not now seek, the reimbursement, compensatory-education, or counseling remedies available under the IDEA. Nor have Petitioners sought a change to an IEP Respondents never accused Petitioners of seeking such relief until their latest filing in this Court. Because the emotional distress damages Petitioners *do* seek are not

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If the parents' suit seeks a type of relief the IDEA does not provide, then "that suit" could not have been filed under the IDEA. Senator Simon made the point explicit in the very next paragraph, where he stated that the HCPA would not require exhaustion "where the hearing officer lacks the authority to grant the relief sought." 131 Cong. Rec. S10,401. Identical language appears in the House report. See Pet. Br. 36.

available under the IDEA, exhaustion was not required.

I. No Party Defends the Sixth Circuit's Holding

The Sixth Circuit recognized that Petitioners "seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But the court inexplicably deemed that fact irrelevant. Rather, what it believed mattered was that Petitioners "could have" invoked IDEA proceedings to obtain *different* remedies for "the injuries alleged in the complaint." Pet. App. 15. The court held that, even if plaintiffs are not actually seeking relief available under the IDEA, the HCPA "requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6. Because Petitioners "could have used IDEA procedures to remedy" the "core harms" they alleged, Pet. App. 6, the Sixth Circuit held that exhaustion was required here.

The Sixth Circuit thus adopted the "injury-centered" approach to interpreting the HCPA. *Payne*, 653 F.3d at 874. And it did so at Respondents' urging. In their motion to dismiss, Respondents described this case as "nearly identical" to other cases "seeking money damages not available under IDEA's administrative procedures." D.Ct. Dkt. 17 at 24; accord *id.* at 23. They argued that "when the focus of the claim is the educational rights of the student, administrative remedies must be exhausted"—and that "**[t]his is so even if the plaintiff is seeking an award that the administrative procedure cannot grant, such as money damages.**" *Id.* at 15-16 (emphasis in original).

Respondents' Sixth Circuit merits brief included identical language. Resp. 6th Cir. Br. 20, 25. Respondents argued that "'even when the plaintiff seeks money damages,'" the "'administrative process might ultimately afford sufficient relief to the injured party, even if it is not the specific relief that the plaintiff requested.'" *Id.* at 20 (quoting *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 916-917 (6th Cir. 1992)). Respondents stated the legal test as follows: "[W]hen a plaintiff has alleged injuries that **could be redressed to any degree** by the IDEA's procedures and remedies, exhaustion of those remedies is required." *Id.* at 16 (internal quotation marks omitted; emphasis in original). The Sixth Circuit simply adopted Respondents' arguments, and Respondents defended that holding in their petition-stage briefing. BIO 6, 16-17, 21-22; Resp. Supp. Br. 7-8. Respondents' Brief in Opposition said that "the only reasonable interpretation of § 1415(*l*) is to require families to utilize IDEA administrative procedures if some form of remedy can also be provided by the IDEA, *regardless of the type of relief specifically sought*." BIO 23 (emphasis added).

Respondents have now abandoned their earlier position, and no longer defend the Sixth Circuit's injury-centered holding. Respondents acknowledge that the HCPA's exhaustion requirement "turns on the substance of the 'relief' the plaintiff 'seek[s],' not the nature of the injury alleged." Resp. Br. 30 (quoting 20 U.S.C. § 1415(*l*)). See also *id.* at 38 ("The requirement of exhaustion under section 1415(*l*) turns on what relief a plaintiff seeks, not why he seeks it."). Respondents admit that lower courts, including the Sixth Circuit, "have used a broader formulation, saying that section

1415(*l*) requires exhaustion whenever a complaint 'allege[s] injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies.'" *Id.* at 30 (quoting *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008); emphasis in Respondents' brief). That, Respondents now concede, "goes too far." *Id.*

Respondents instead have radically shifted their argument. They now submit that this suit *is* one "seeking relief that is also available under the IDEA," because IDEA proceedings offer, in substance, the same relief as the Fry family seeks. Resp. Br. 44. As we show below, Respondents are incorrect. But the overriding point is this: No party before this Court defends the Sixth Circuit's holding.[2] Under that holding, exhaustion is required whenever a plaintiff alleges an injury that can be remedied in any way in IDEA proceedings, even if those proceedings cannot, in form or substance, provide the specific remedy the plaintiff seeks. All parties now concede that holding was wrong.

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[2] Given their renunciation of the legal analysis on which the Sixth Circuit—like most other circuits, Pet. 12-15—relied, Respondents' suggestion that Congress ratified a settled judicial construction (Resp. Br. 31) rings hollow. Such implicit ratification of lower-court decisions can hardly overcome the plain statutory text in any event.

II. Emotional Distress Damages Are Not Available in Form or Substance Under the IDEA

A. A Substantive Approach Cannot Efface the Limits on Relief Available Under the IDEA

Respondents' new position rests on a fundamental mischaracterization of Petitioners' argument. Respondents assert that Petitioners "contend that section 1415(*l*) is concerned with form alone." Resp. Br. 31. They suggest that our position rests on "the contention that the statute's application turns on the form of a plaintiff's prayer for relief." Resp. Br. 28. Respondents are wrong.

A substantive approach does not eliminate the basic principle that some types of relief are available in IDEA proceedings and others are not. As Respondents now concede, exhaustion is required only when the suit is actually seeking a type of relief that is, in substance, available under the IDEA. See Resp. Br. 19 (stating that the HCPA "makes exhaustion turn on what 'redress or benefit' a plaintiff requests"); *id.* at 15 (describing the HCPA as analogous to other statutes "that make a plaintiff's right to sue dependent on the type of 'relief' he seeks"). Even if, in Respondents' terms, IDEA proceedings might afford a disabled child *some* "redress or benefit," the HCPA does not require exhaustion unless the child's non-IDEA lawsuit is actually seeking a type of redress or benefit that is available in IDEA proceedings.

All parties agree that compensatory damages for pain, suffering, and emotional distress are not available in IDEA proceedings. See Pet. Br. 5; Resp.

Br. 7, 36. All parties also agree that other types of relief—such as tuition reimbursement or prospective changes to an IEP—*are* available in IDEA proceedings. See Pet. Br. 5; Resp. Br. 6. And all parties agree that a child with a disability cannot evade the limitations on relief available in IDEA proceedings—or the HCPA's reciprocal limitations on the right to proceed directly to court on a non-IDEA claim—through "lawyerly inventiveness." Resp Br. 26 (internal quotation marks omitted). A disabled child cannot evade the HCPA's exhaustion requirement simply by filing an ADA suit seeking something labeled "damages" that is measured by the cost of private-school tuition. Tuition reimbursement is available in IDEA proceedings; the label a party attaches to the relief does not govern. See Pet. 16 n.7; Resp. Br. 19.[3]

But this principle goes both ways. If a child with a disability filed an IDEA administrative claim seeking monetary compensation for pain, suffering, and emotional distress, the request for relief would fail. Such compensation is not available in IDEA proceedings. The request would fail even if the child's lawyer called the compensation "reimbursement" rather than "damages." And because monetary compensation for pain, suffering, and emotional injury is not available in IDEA proceedings, a disabled child

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[3] This is the position that the Government took, and the Ninth Circuit endorsed, in *Payne*, 653 F.3d at 875. It is also the position that Petitioners have taken in our prior filings in this Court. See Pet. 16 n.7. The Solicitor General has likewise made clear that a plaintiff who seeks tuition reimbursement or compensatory education must exhaust IDEA proceedings, regardless of the label attached to that relief. See U.S. Br. 5, 34.

seeking such compensation in a non-IDEA suit need not exhaust those proceedings. Again, it is the substance of the relief requested, rather than the label attached to it, that matters.

A substantive approach thus tells a court how to determine whether the type of relief the plaintiff seeks is available under the IDEA. It does not eliminate the IDEA's own limitation on the remedies available under the statute. Nor does it eliminate the HCPA's basic rule that exhaustion is required only when the plaintiff's action "seek|s| relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*).

The cases on which Respondents rely underscore the point. See, *e.g.*, *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (applying the prospective/retrospective distinction that controls whether relief is available under *Ex parte Young*, 209 U.S. 123 (1908), but holding that the distinction does not turn on the label a party attaches to a request for relief); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (applying the equitable/legal distinction that controls whether relief is available under ERISA, but holding that the distinction does not turn on a party's label); *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 659 (2016) (same); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999) (enforcing the limitation on proceedings under 5 U.S.C. § 702(a) to cases "seeking relief other than money damages" but holding that the "damages" category is defined by substance rather than labels). These cases do not stand for the proposition that courts should efface the limitations that the law places on the relief available in particular fora. To the contrary, the

Court firmly enforced those limitations. Rather, Respondents' cases simply stand for the proposition that courts should look beyond labels and focus on the substance of the relief. That proposition does not aid Respondents.

B. Emotional Distress Damages Are Different in Substance From the Relief Available Under the IDEA

There is a real difference—in substance and not just form—between emotional distress damages and the relief available in IDEA proceedings. Respondents suggest that there is little substantive difference between emotional distress damages and two types of relief available under the IDEA: (1) compensatory education and counseling; and (2) reimbursement of educational expenses. Resp. Br. 30-31. Respondents are incorrect.

Take compensatory education first. An order to provide services to prospectively reduce the harms flowing from a statutory violation is very different in substance from an order to pay money to make the plaintiff whole for past pain, suffering, and emotional distress. The law consistently distinguishes between prospective relief and retrospective damages—even where those remedies respond to the same harms. That is the central distinction applied in this Court's Eleventh Amendment cases, on which Respondents themselves rely. See Resp. Br. 20, 22-23. In *Milliken v. Bradley*, 433 U.S. 267, 288-289 (1977), for example, the Court recognized that the plaintiffs could not recover retrospective monetary relief against Michigan for its past school segregation. But it approved an order requiring the state to pay for compensatory

education programs to counteract the effects of the segregation. See *id.* at 289-290. "That the programs are also 'compensatory' in nature," the Court explained, "does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system." *Id.* at 290.

Compensatory education and counseling are available under the IDEA in some circumstances; money to compensate for past emotional harms is not. A civil action seeking only the latter remedy is not "seeking relief that is also available under" the IDEA. 20 U.S.C. §1415(*l*). That the plaintiff seeking emotional distress damages might instead have chosen to seek the prospective provision of education and counseling does not mean that the plaintiff *actually* sought the latter remedy, in form or substance. Under the plain text of the HCPA, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne*, 653 F.3d at 875 (emphasis in original). General exhaustion principles, too, focus on what the plaintiff *actually* sought, rather than what she *could have* sought. See *McCarthy v. Madigan*, 503 U.S. 140, 154 (1992) (refusing to presume "that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, that he is likely interested in 'other things'").

Next, consider the monetary relief available under the IDEA. Respondents argue that "the IDEA plainly makes available many of the same 'benefit[s]'—including money—that plaintiffs may seek in the form of compensatory damages." Resp. Br. 32. But the type

of monetary relief available under the IDEA is very different from compensation for past emotional harms. Respondents point to two types of monetary relief that are available under the IDEA. Resp. Br. 6-7. The first is reimbursement of private-school tuition for periods in which a school district failed to provide the child a free appropriate public education. See *id.* at 6. The second is "prospective monetary relief for 'compensatory education,' including tutoring, counseling, and remedial therapy designed to compensate for 'educational services [a] child should have received in the first place.'" *Id.* (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005)).

The law has long recognized a distinction—of substance and not just form—between monetary relief that reimburses a plaintiff for the cost of services that the defendants failed to provide and monetary relief that compensates a plaintiff for the emotional harms caused by a past violation of law. This distinction appears in the very cases on which Respondents rely. In *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988), the Court distinguished between "money damages," which "normally refers to a sum of money used as compensatory relief" that is "given to the plaintiff to *substitute* for a suffered loss," and "specific remedies," which might take the form of money but "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." (emphasis in original; internal quotation marks omitted). The Court applied this same distinction between "substitute relief" and "specific relief" in *Blue Fox*, 525 U.S. at 262.

Tuition reimbursement and money for compensatory education are specific relief. Indeed, *Bowen* itself pointed to IDEA tuition reimbursement as an example of substitute relief that is distinct from damages. See *Bowen*, 487 U.S. at 894 (quoting *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370-371 (1985)). Money paid in these IDEA remedies is earmarked for defraying a specific out-of-pocket cost—the cost of providing educational services. Hearing officers and courts may even require payments for reimbursement and compensatory education to be placed in an escrow account so that the parents may use them *only* for those purposes. See, *e.g.*, *Streck v. Bd. of Educ. of E. Greenbush Cent. Sch. Dist.*, 408 F App'x 411, 415 (2d Cir 2010). As the cases Respondents cite demonstrate, compensatory education awards often do not involve *monetary* relief at all. See, *e.g.*, *Reid*, 401 F.3d at 523-524 (ordering school district to provide compensatory services prospectively); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (describing compensatory education as "specific non-monetary equitable relief"). And although they may contribute to improving a disabled child's condition in the future, even monetary payments for reimbursement and compensatory education cannot make the child whole for past emotional injuries.

Payments to compensate for pain and suffering are very different. They are a classic form of substitute relief. Such payments do not reimburse specific out-of-pocket costs, and they are not earmarked for financing particular services in the future. In many cases, as here, they do not even respond to *educational* injuries of the type recognized by the IDEA. Rather, they represent a necessarily imperfect effort to make the

child whole for past emotional injuries. A disabled child who files an ADA lawsuit seeking monetary compensation for pain and suffering is not "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), even if she *could have* sought a *different* monetary remedy for specific relief in IDEA proceedings.

C. The Mere Fact That a Suit Involves a School's Treatment of a Child with a Disability Does Not Implicate IDEA Remedies

Respondents state that "whenever plaintiffs seek relief for injuries caused by a school's failure to provide an accommodation for a child with a disability, it is highly probable that awarding that relief would invalidate or alter the child's IEP." Resp. Br 30 (internal quotation marks omitted).[4] Respondents are wrong. Indeed, the suggestion that IDEA remedies will be implicated by the mere fact that a suit involves a school's treatment of a disabled child is at war with the HCPA. That statute addresses educational suits

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[4] Respondents suggest that some such cases will not implicate the child's IEP, but it is not clear how they determine what cases would fall into that category. Respondents state that a suit seeking compensation "for pain and suffering or medical expenses incurred as a result of discrete instances of past abuse" could proceed without exhaustion, because it "would presumably not implicate the validity of the child's IEP." Resp. Br. 36-37. As an example of that sort of case, Respondents cite *Payne*. See Resp. Br. 36-37. But the abuse in *Payne* took the form of a teacher's (incredibly misguided) classroom-management practice—repeatedly placing a child in a locked "time-out room or 'safe room' for students who became 'overly stimulated'"—that was specifically addressed in the IEP process. *Payne*, 653 F.3d at 865-866. If *Payne* did not implicate an IEP, this case does not do so, either.

brought under "Federal laws protecting the rights of children with disabilities," and it requires administrative exhaustion only for those suits that are "seeking relief that is also available under this subchapter." 20 U.S.C. § 1415(*l*). If the mere fact that a disabled child was suing over her treatment at school meant exhaustion was required, the "seeking relief" clause would be superfluous.

There are numerous circumstances in which a child's successful ADA suit—whether for damages or declaratory relief—will not require alteration of her IEP For one thing, the child may have left the school district by the time the lawsuit is decided. See, *e.g.*, *Payne*, 653 F.3d at 866 (noting that the parents "removed D.P. from the public school system and began home schooling him" before filing suit). At that point, a successful lawsuit may compel the district to pay damages, but there will be no IEP to invalidate or change.[5]

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[5] Respondent is wrong to suggest (Resp. Br. 35 & n.9, 39) that exhaustion would be required here under the approach the Government advocated in *Payne*. The Government's brief in that case argued that only challenges to "the adequacy of a student's *ongoing* education" could require a change to the IEP. DOJ *Payne* Br. 22 (emphasis added). See also *id.* at 11-12 (stating that "the functioning and purpose of the IDEA hearing process presupposes an ongoing educational dispute between student and school district and is designed to address a student's current and future educational needs rather than adjudicate tort liability for past misconduct"); *id.* at 17-18 (similar); *id.* at 14 ("Where a plaintiff has no ongoing educational dispute with the defendant school system and neither sues under the IDEA nor seeks relief available under the IDEA, nothing in this provision requires exhaustion of IDEA procedures."); *id.* at 22 (referring to "an ongoing IDEA-related practice," "the ongoing practice," and

Even if the child remains in the district, the accommodation the plaintiff seeks in an ADA suit may not be one the IDEA requires to be included in an IEP. The IDEA requires accommodations to be included in an IEP only if they aim to achieve the statute's educational goals. See 20 U.S.C. § 1414(d)(1)(A)(i). Although a successful ADA suit might lead to a change in how the school district treats a child with a disability, it does not follow that the district would have to memorialize that change in an IEP And an order invalidating or amending the IEP is available in IDEA proceedings only if the failure to accommodate denies a free appropriate public education or otherwise imposes the kind of educational deprivation that violates the IDEA. See 20 U.S.C. § 1415(f)(3)(E). A lawsuit seeking an accommodation that does not involve such an educational deprivation thus is not seeking relief available under the IDEA.

And even if a successful ADA suit for damages or declaratory relief might ultimately lead a school to propose a change in a child's IEP, that does not mean that the plaintiff was "seeking" such a change as "relief" in the suit. See Black's Law Dictionary (10th ed. 2014) (defining "relief" as "[t]he redress or benefit . that a party asks of a court"). Any change the school proposed at that point would have to proceed through the IDEA process of negotiation, administrative proceedings, and possibly judicial

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"challenges to ongoing educational practices"). The Government's brief argued that the family in *Payne* "had no ongoing dispute with the school or the district that required an IDEA hearing to resolve, and thus they had no further remedies to exhaust." *Id.* at 24-25. As we show below, the same is true of Petitioners here.

review, before it became effective. The integrity of IDEA proceedings would thus be fully preserved.

III. Because This Case is Not Seeking Relief Available Under the IDEA, Exhaustion Was Not Required

A. Petitioners are Not Seeking Relief Available Under the IDEA.

Petitioners' complaint sought one principal type of relief—"damages in an amount to be determined at trial." BIO App. 21. As we have made clear throughout our briefing, that request referred to emotional distress damages, a type of relief that is not available in form or substance in IDEA proceedings. Pet. 1-2; Pet. Br 14.

Respondents now argue that the term "damages" might be stretched to include reimbursement of educational expenses or payments for compensatory education or counseling. Resp. Br. 44-48. Respondents are engaging in the very "lawyerly inventiveness" they project onto Petitioners. As Respondents' cases demonstrate, the law generally uses the term "damages" to refer to "substitute relief" rather than "specific relief." See *Blue Fox*, 525 U.S. at 261-262; *Bowen*, 487 U.S. at 895. The complaint here used the term in its standard legal sense. Tellingly, Respondents cannot point to a single paragraph of the complaint that alleges any (past or future) out-of-pocket educational or counseling expenses that might require reimbursement, much less any ongoing need for compensatory education or counseling. And to the extent any ambiguity remains, we reiterate: Whether under the label of damages, declaratory relief, or any

other relief, Petitioners do not seek tuition reimbursement, compensatory education, counseling, or any other "substitute" monetary relief. Nothing in the HCPA required Petitioners to first seek in-kind IDEA remedies before seeking entirely different relief under other statutes. See *Payne* 653 F.3d at 880-881.

Respondents argue that Petitioners' request for damages and declaratory relief under the ADA and Rehabilitation Act effectively seeks a judgment that E.F 's IEP was invalid. Resp. Br. 49-50. But Petitioners have not sought a change to the IEP, nor would this litigation lead to one. Respondents have consistently taken the position that allowing Wonder to accompany E.F to school was not necessary to achieve the IDEA's educational goals. See Pet. Br. 10-13. We have not challenged that position in this litigation. Rather, we have alleged that exclusion of the service dog violated the independent requirements of the ADA and the Rehabilitation Act. The Department of Education thus concluded that a "FAPE analysis"—the same analysis required to determine whether the IEP was invalid—was inapposite here. J.A. 35. And indeed, the IEP did not *prohibit* Respondents from allowing E.F to be accompanied by her dog; it simply noted that Respondents had refused to allow it. BIO App. 8. As a result, as Judge Daughtrey noted in her dissent below, allowing Wonder to accompany E.F "would not require a modification of [the] IEP " Pet. App. 27

Indeed, because all parties agree that the exclusion of Wonder did not deny E.F a free appropriate public education, *no* relief would have been available to Petitioners in IDEA proceedings. Pet. Br. 46-48.

Respondents argue that this "makes no difference" and that relief is "available" under the statute even if "the plaintiff may not ultimately be entitled to" it. Resp. Br. 51. But this Court has applied a practical, "real-world" interpretation of what remedies are "available" in administrative proceedings. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). A remedy is available only if it is in fact "capable of use" or "is accessible or may be obtained." *Id.* at 1858 (internal quotation marks omitted). Because all parties agree that there is no IDEA violation here, no relief could have been obtained under that statute.

If E.F had remained in the school district, and Petitioners ultimately prevailed in this suit, Respondents might have decided to propose changes to her IEP in response to the court's judgment. Any such proposals could at that point have been addressed through the IDEA's process of negotiation and administrative review But a successful ADA suit would not have *required* any IEP change. And because E.F has left the school district and has no intention of returning, Pet. Br 14, Petitioners lack standing to seek any forward-looking relief against Respondents in any event. There is, simply, no current IEP that this litigation could change. See Pet. Br. 49.[6]

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[6] Respondents assert that Petitioners waived any argument that exhaustion would be futile here. Resp. Br. 53-57. But throughout this litigation Petitioners have consistently invoked the HCPA's "seeking relief that is also available" language—language that codifies one aspect of the futility exception. See Pet. Br. 28-32. Respondents suggest that our reading would render superfluous the HCPA's language requiring exhaustion in non-IDEA cases only "to the same extent as" in IDEA cases. Resp. Br. 55. Not so. The

Respondents suggest that, by removing E.F. from their district, the Fry family has waived its claim that IDEA remedies are unavailable. Resp. Br. 51, 57. That suggestion disregards a key fact: This civil action is not seeking—and cannot seek—a change to the IEP, nor is it seeking other IDEA remedies. Nor is there any requirement that individuals must continue to subject themselves to legal violations in order to seek damages for those violations. For three school years, Petitioners diligently engaged with Respondents and pursued administrative remedies, before they ultimately found it necessary to move E.F. to a district that would embrace her and her dog. Pet. Br. 10-14. This Court has recognized that parents do not forfeit the right to obtain relief when they are forced to make such difficult choices for their children. See, *e.g.*, *Sch. Comm. of Town of Burlington*, 471 U.S. at 370.

B. If the Court Concludes that the Complaint Embraces Other Requests for Relief that Should Have Been Exhausted, It Should Allow the Claim for Emotional Distress Damages to Proceed

As we have shown, the complaint sought emotional distress damages, which are not available under the IDEA. The complaint does not allege any educational

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"seeking relief" language makes clear that, whatever *other* aspects of the futility doctrine a court might choose to apply under the "to the same extent" language, exhaustion is not required in non-IDEA cases unless the relief the plaintiff seeks is available in IDEA proceedings. The "seeking relief" language "made a conclusion clear that might otherwise have been fought over in litigation," so there is no surplusage. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 87 (2002).

expenses that might require reimbursement, nor does it allege any ongoing need for compensatory education or counseling. The complaint does not seek to change an IEP. Because Petitioners left the school district more than four years ago and have no intention to return, there is no IEP to change, and they could not seek forward-looking relief against Respondents even if they wanted to. And because all parties agree there was no IDEA violation here, no relief would have been available in IDEA proceedings in any event. This case is thus not "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*).

If the Court nonetheless concludes that the complaint may be read to embrace a request for some relief that *is* available under the IDEA—whether in the requests for damages or declaratory relief under the ADA and the Rehabilitation Act, or in the boilerplate request for "any other relief the court deems appropriate"—the Court should allow at least the request for emotional distress damages to proceed.

First, although Fed. R. Civ. P. 54(c) authorizes a plaintiff to receive any relief to which she is "entitled," it is a basic principle that "relief that the parties do not desire should not be forced on them." 10 Wright et al., Fed. Prac. & Proc. Civ. § 2662 (3d ed. & Apr. 2016 update). Requests for relief are not frozen at the time the complaint is filed. For example, in *Steffel v. Thompson*, 415 U.S. 452 (1974), the complaint sought declaratory and injunctive relief against a threatened state criminal proceeding. On appeal from dismissal of his action, the plaintiff abandoned his request for injunctive relief, and this Court considered only the request for declaratory relief. *Id.* at 463. See also

Walker v. Anderson Elec. Connectors, 944 F.2d 841, 844 (11th Cir. 1991) (plaintiff was not "entitled" to declaratory and injunctive remedies under Rule 54(c) when she sought them in her complaint but abandoned the request later in the proceedings), cert. denied, 506 U.S. 1078 (1993). The whole point of Rule 54(c) is "to eliminate the theory-of-the-pleadings doctrine and decrease the importance of the pleading stage in federal litigation." 10 Wright et al., *supra*, § 2662 (footnotes omitted). Requiring exhaustion because the complaint might conceivably support particular types of relief—even though Petitioners have specifically renounced any request for them—would reinstitute the "tyranny of formalism" that Rule 54(c) aims to avoid. *Id.* § 2662 n.20.

Second, under basic exhaustion principles, dismissal of the entire action is not appropriate simply because *some* of the complaint's requests for relief implicate an exhaustion requirement. In *Jones v. Bock*, 549 U.S. 199, 221 (2007), this Court applied the general rule that "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." It thus held that the total-exhaustion rule—under which an entire case should be dismissed if one claim should have been exhausted—was limited to habeas corpus cases. See *id.* at 221-222. As the Court explained, in habeas cases all claims generally seek the same relief—release from custody See *id.* at 221. But when a case contains multiple requests for distinct forms of relief, this Court typically treats those requests separately. See *Los Angeles v. Lyons*, 461 U.S. 95, 101, 109 (1983) (plaintiff lacked standing for his "claim for injunctive relief" but could proceed on his "claim for damages").

Although the complaint plainly requests damages relief for which exhaustion is not required, Respondents argue that the entire case should be dismissed because the complaint might arguably embrace *other* requests for relief that should have been exhausted. Under *Jones*, this Court should allow Petitioners to proceed on their claims for emotional distress damages, even if it concludes that the complaint could encompass other forms of relief that should have been exhausted. At the very least, the Court should follow the procedure that applies in habeas cases and allow Petitioners to delete any (implied) requests for relief that are barred by the exhaustion requirement so that Petitioners may proceed with the others. See *Jones*, 549 U.S. at 222 (quoting *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

Third, Respondents' approach would eviscerate the limitations Congress "baked into [the] text," *Ross*, 136 S. Ct. at 1862, of the HCPA's exhaustion requirement. Congress limited exhaustion to non-IDEA cases "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). If a plaintiff is deemed to be "seeking" any remedy a court might award—even if she has renounced any desire to obtain that remedy—then the HCPA's express limitation is meaningless. If Respondents were right, Congress would have written the HCPA to require exhaustion in any case "in which the plaintiff might be entitled to relief that is also available under" the IDEA. Congress's use of the word "seeking" instead demonstrates a desire to focus the exhaustion inquiry on what the plaintiff actually is attempting to obtain in her lawsuit, not on what a court might hypothetically award. See Pet. Br. 22-23 n.5 (dictionary definitions of "seek"). Because

Petitioners are actually seeking emotional distress damages, which are not available under the IDEA, the Sixth Circuit was wrong to require exhaustion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

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No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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SUPPLEMENTAL BRIEF FOR PETITIONERS

As the Solicitor General explained in his brief filed at this Court's invitation, this case presents an important and recurring question that has persistently divided the circuits, and the Sixth Circuit's resolution of that question flies in the face of the clear statutory text. Nothing in Respondents' supplemental brief undermines the conclusion that this Court should grant *certiorari*.

1. As we explained in our petition and reply brief, the circuits are persistently split over the question presented. Although the Sixth Circuit's decision here is consistent with decisions from six other circuits, it directly conflicts with the Ninth Circuit's *en banc* decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011), cert. denied, 132 S. Ct. 1540 (2012). See Pet. 12-18; Reply to BIO 2-7. The Solicitor General agrees that this case implicates an entrenched circuit conflict. See U.S. Br. 18-23.

In their supplemental brief, Respondents insist that any circuit conflict was not outcome determinative, because the Ninth Circuit "would have reached the same result as the Sixth Circuit in this case." Resp. Supp. Br. 3. That is incorrect. Respondents note the Ninth Circuit's statement that exhaustion would be required "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education." *Payne*, 653 F.3d at 875. But although the Sixth Circuit invoked that language in rejecting Petitioners' claims, Pet. App. 20, the Ninth Circuit would not have held that those claims arose as a result of a denial of a free appropriate public education.

The Ninth Circuit defined the class of cases that "arise as a result of a denial of a free appropriate public education" as those "that rel[y] on the denial of a FAPE to provide the basis for the cause of action." *Payne*, 653 F.3d at 875. The court gave two examples: (1) cases "directly" alleging a violation of the IDEA itself, *id.*, such as the *Payne* plaintiff's request for damages under 42 U.S.C. § 1983 for a violation of "D.P.'s 'statutory rights under the IDEA,'" *id.* at 883;[*] and (2) cases seeking damages under Section 504 of the Rehabilitation Act, in which the "§ 504 claim is premised on a violation of the IDEA." *Id.* at 875. (Under the Department of Education's regulations, one way to establish a violation of Section 504 is to demonstrate that a school failed to provide a qualified child with a disability "a free appropriate public education." 34 C.F.R. § 104.33(a).) The cases identified by the Ninth Circuit are not those in which conduct that violates the ADA or Rehabilitation Act also might happen to violate the IDEA. Rather, they are cases in which the plaintiff must prove an IDEA violation as an element of establishing her statutory claim—that is, cases in which "the denial of a FAPE provide[s] the basis for the cause of action." *Payne*, 653 F.3d at 875.

That is emphatically not the rule applied by the Sixth Circuit here. Nothing in Petitioners' ADA and Rehabilitation Act claims requires proof that the refusal to allow the service dog denied E.F a free appropriate public education. Indeed, nothing in those claims requires proof of any effect on E.F.'s education at all. Petitioners' claims rest on Respondents' failure

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[*] That was the only claim on which the *Payne* court affirmed the dismissal for failure to exhaust. See *Payne*, 653 F.3d at 883.

to adhere to their statutory obligation to permit the use of a service dog. As operators of a public facility, Respondents would owe that obligation to any invitee on their premises, whether or not that invitee was a student. See 28 C.F.R. § 35.136(g). And contrary to Respondents' suggestion (Supp. Br. 5), the social and emotional harms E.F experienced do not rest on the denial of an adequate education.

The Sixth Circuit held that exhaustion was required, not because Petitioners would have to establish a denial of a FAPE in order to prove their ADA and Rehabilitation Act claims, but because the injuries the Fry family alleged overlapped with injuries that might also have been redressed under the IDEA. See Pet. App. 10-14. That is precisely the "'injury-centered' approach" to exhaustion that the Ninth Circuit specifically "reject[ed]" in *Payne*, 653 F.3d at 874. Indeed, in *Payne* itself IDEA proceedings might have provided some redress for the injuries the plaintiff alleged, but the Ninth Circuit reversed the district court's judgment requiring exhaustion. See Rep. to BIO 3. The entrenched circuit split thus determined the outcome here.

2. Respondents argue that the Sixth Circuit's decision was correct. Supp. Br. 6-8. Although Respondents say that "[t]he [d]ecision [b]elow [r]espects [c]ongressional [i]ntent," *id.* at 6, their supplemental brief curiously avoids discussing the most important index of congressional intent—the statutory text. That text requires exhaustion of non-IDEA claims only when the plaintiffs actually "seek[] relief that is also available under" the IDEA. 42 U.S.C. § 1415(*l*).

In interpreting the IDEA, this Court has emphasized that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted). Honoring the choices Congress expressed in the statutory text is especially important in determining rules for exhaustion of administrative remedies. See Pet. 20-24; Reply to BIO 8-10. Exhaustion rules reflect a balance between two important considerations: the imperative to avoid undue obstacles in access to justice, and the policy of promoting the efficiency and authority of administrative proceedings. Congress balances these considerations differently in different contexts. This Court has recognized that exhaustion is typically not required when the agency "lack[s] authority to grant the type of relief requested." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992); see also *id.* at 156 (Rehnquist, C.J., concurring in the judgment) (exhaustion of prison grievance procedures not required "where prisoners seek monetary relief" and the grievance process "does not provide for any award of monetary damages"). Sometimes, however, Congress requires exhaustion if the administrative procedures can provide *any* form of relief, even if it is not the relief sought by the plaintiffs. See, *e.g.*, *Booth v. Churner*, 532 U.S. 731 (2001) (Prison Litigation Reform Act).

When it enacted the Handicapped Children's Protection Act, Congress adopted text that made clear that it intended to follow the typical practice of requiring exhaustion only when plaintiffs "seek[] relief that is also available" in the administrative proceedings. 42 U.S.C. § 1415(*l*). The Sixth Circuit

was wrong to displace that decision with its own balancing of the relevant policy concerns.

3. Respondents suggest (Supp. Br. 9-10) that the futility exception to the exhaustion requirement provides an appropriate safety valve for cases in which IDEA proceedings cannot grant plaintiffs the relief they seek. But the hypothesis that Petitioners might have invoked the extra-textual futility exception does not detract from the need to review the Sixth Circuit's actual refusal to apply the limits to exhaustion that appear in the statutory text. For one thing, the HCPA's text is plausibly read as codifying and delimiting an aspect of the futility doctrine. Where a plaintiff claims that resort to the IDEA process is futile because that process cannot provide the remedy she seeks, respect for Congress requires courts to look to the explicit statutory provision that addresses the question.

More to the point, the Sixth Circuit suggested that Petitioners could not invoke the futility doctrine here, because it was the Fry family's decision to move E.F. to a new school district that rendered the IDEA proceedings inadequate. See Pet. App. 17-18. As we have shown, the family's decision reflected an entirely appropriate effort to ensure that E.F could most quickly and efficaciously vindicate her right to attend school with her service dog. See Reply to BIO 10-12. Whether or not the Sixth Circuit was correct in interpreting the judge-made futility doctrine, however, the explicit statutory text excused Petitioners from exhaustion. Their action did not "seek[] relief that is also available under" the IDEA. 42 U.S.C. § 1415(*l*). The Sixth Circuit's refusal to heed that language, and

the persistent conflict in the circuits over that language—a conflict that determined the outcome here—demand this Court's review.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

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NAPOLEON COMMUNITY SCHOOLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

TIMOTHY J. MULLINS
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084
(248) 457-7020

NEAL KUMAR KATYAL
Counsel of Record
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 15-497

STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

INTRODUCTION

The United States has filed a brief recommending that this Court grant the petition and reverse the Sixth Circuit on a question that will ultimately have no impact on this case. That would be an imprudent use of the Court's time and resources. The court of appeals gave full effect to Congress' intent that plaintiffs claiming injuries based on schools officials' educational decisions avail themselves of the IDEA's administrative process before they sue in federal court. The petition should be denied.

The United States asserts that this case implicates a circuit split. U.S. Br. 18-22. But a look at the Sixth Circuit's reasoning dispels that claim. The

court of appeals affirmed the district court's dismissal of petitioners' complaint after concluding that their claims arose "as a result of a denial of a FAPE" and that they alleged injuries that were, "in essence a violation of IDEA standards." Pet. App. 20 (brackets and citation omitted). On that point, the circuits are unanimous. So even if there was some difference in the way courts have approached the exhaustion requirement, that difference would not affect the outcome of this case.

Without an outcome-determinative split, the United States leans heavily on its merits argument. U.S. Br. 11-18. But that argument is wrong. The IDEA does not give a plaintiff license to plead around exhaustion. Rather, section 1415(*l*) balances Congress' desire to give litigants access to the remedies available under the ADA and Rehabilitation Act with its considered decision to channel "the initial evaluation of whether a disabled student is receiving a free, appropriate public education" to "those with specialized knowledge," *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002), and thereby "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students," Pet. App. 9 (quoting *Payne* v. *Peninsula School District*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino* v. *Baca*, 747 F.3d 1162 (9th Cir. 2014)). The decision below respects that balance by requiring exhaustion where a "suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute." *Id.* at 10-11.

Finally, the United States claims that requiring exhaustion is unfair to plaintiffs who seek purely

retrospective relief. U.S. Br. 17-18. But petitioners here could have avoided many if not all of their alleged injuries through IDEA procedures. And exhaustion serves the valuable purpose of developing an expert record for judicial review. In those cases where exhaustion is improper, plaintiffs may of course assert the futility exception petitioners elected not to press.

Petitioners and the United States fail to make a persuasive case for certiorari. This Court does not normally review substantively correct decisions that would come out the same way in every other circuit that has considered the same question.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE APPROACH OF EVERY CIRCUIT TO CONSIDER THE SCOPE OF THE EXHAUSTION REQUIREMENT.

The United States endorses petitioners' insistence that their case would not have been dismissed in the Ninth Circuit because "none of the relief [they] specifically requested was available under the IDEA." Pet. 17 (emphasis omitted). They are mistaken. Although the Ninth Circuit's decision in *Payne* contains language that appears helpful to petitioners, that court—and all six other circuits that have weighed in on the issue—would have reached the same result as the Sixth Circuit in this case.[1]

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[1] *See Frazier*, 276 F.3d at 57, 59 (1st Cir.) (suit under section 1983 alleging denial of a FAPE); *Cave* v. *East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247 (2d Cir. 2008) (ADA and Rehabilitation Act claims based on denial

Payne made clear that exhaustion is required where "'both the genesis and the manifestations of the problem are educational,'" including where a plaintiff "seek[s] to enforce rights that arise as a result of a denial of a free appropriate public education." 653 F.3d at 875 (brackets and citation omitted); *see* Pet. App. 20; *see also Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 278 (3d Cir. 2014); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002). That is the case here.

The United States insists that "petitioners' Title II and Section 504 claims are not based on the denial of a FAPE," and so do not require exhaustion under *Payne*. U.S. Br. 21. But that is not what the Sixth Circuit found. Rather, the court found that "[t]he

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of service dog not "materially distinguishable from claims that could fall within the ambit of the IDEA"); *Batchelor* v. *Rose Tree Media Sch. Dist.*, 759 F.3d 266, 273-275 (3d Cir. 2014) (ADA and Rehabilitation Act retaliation claims arising from dispute over provision of a FAPE); *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 990-991, 993 (7th Cir. 1996) (ADA and Rehabilitation Act claims based on teacher-led bullying had "educational source and an adverse educational consequence"); *Payne*, 653 F.3d at 875 (9th Cir.) (exhaustion required for actions "seeking to enforce rights that arise as a result of a denial of a [FAPE]"); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1067-68 (10th Cir. 2002) (Rehabilitation Act claims based on teacher selection, tardy provision of educational materials were "educational in nature"); *M.T.V.* v. *DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 1155 (11th Cir. 2006) (ADA, Rehabilitation Act, and First Amendment claims based on retaliation for parent's advocacy).

core harms that [petitioners] allege * * * relate to the specific educational purpose of the IDEA." Pet. App. 6. Indeed, the decision quoted *Payne* in concluding that exhaustion was required because petitioners' claims arose "'as a result of a denial of a [FAPE].'" *Id.* at 20 (quoting *Payne*, 653 F.3d at 875). The United States may disagree with the Sixth Circuit's characterization of petitioners' complaint, but it cannot fashion an outcome-determinative question by rewriting the decision on review.

For the same reason, petitioners are wrong to say that the Ninth Circuit would not have required them to exhaust because they "sought damages for emotional distress—a form of relief that is not available in IDEA proceedings." Pet. 17. That argument, adopted now by the United States (at 21), again ignores the fact that the Sixth Circuit found that "[t]he core harms that [petitioners] allege arise from the school's refusal to permit E.F. to attend school with [her dog] relate to the specific educational purpose of the IDEA." Pet. App. 6. The Ninth Circuit would have ruled the same way under the circumstances. Addressing the emotional distress claim pleaded in *Payne*, the Ninth Circuit explained that, if the plaintiff's "'emotional distress' *stems from* [the plaintiff's] concern that [her child] was not receiving an adequate education, then *exhaustion is required*." 653 F.3d at 883 (emphases added). That describes this case.

Whatever differences may exist among the circuits about the proper scope of the IDEA's exhaustion requirement, those differences simply are not implicated by this case. If this Court is interested in the question, it should await a case in which the answer would be outcome-determinative.

II. THE DECISION BELOW WAS CORRECT.

If the IDEA's exhaustion requirement means anything, it means that plaintiffs may not circumvent the Act's administrative remedies "by taking claims that could have been brought under [the] IDEA and repackaging them as claims under some other statute." *Batchelor*, 759 F.3d at 272 (citation omitted). In enacting section 1415(*l*), Congress was clear that, "if [a] suit could have been filed under the" IDEA's predecessor statute, "then parents are required to exhaust * * * administrative remedies." *Payne*, 653 F.3d at 876 (quoting S. Rep. No. 99-112, at 15 (1985), 1986 U.S.C.C.A.N. 1798, 1805) (emphasis omitted). The Sixth Circuit faithfully followed that instruction.

A. The Decision Below Respects Congressional Intent.

The United States contends that exhaustion is required only when a complaint's prayer for relief asks for some remedy available under the IDEA. U.S. Br. 12, 14-15. That reading of the statute privileges form over substance to the detriment of Congress' intent. The better view is that "[t]he nature of the claim and the governing law determine the relief no matter what the plaintiff demands." *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 992 (7th Cir. 1996); *see also, e.g.*, *Cave* v. *East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246 (2d Cir. 2008) ("[T]he theory behind the grievance may activate the IDEA process, even if the plaintiff wants a form of relief that the IDEA does not supply.") (citation and internal quotation marks omitted). *Cf. Montanile* v. *Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) ("[W]hether the remedy a plaintiff seeks

is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought.") (some alterations, internal quotation marks, and citation omitted).

In this case, the Sixth Circuit found that petitioners' claims "seek[] redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP." Pet. App. 10. The court of appeals observed that petitioners' claims were predicated on the harms E.F. allegedly sustained because her dog was not available to assist her in "develop[ing] independence and confidence" and helping "her to bridge social barriers." Resp'ts' App. 7 (Compl. ¶ 28). Those are precisely "the sort[s] of interest[s] the IDEA protects." Pet. App. 11; *see, e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb) (IEP must address "educational needs that result from the child's disability"); 34 C.F.R. § 300.34(a) (identifying, among "[r]elated services" "psychological services, physical and occupational therapy, recreation, including therapeutic recreation, * * * counseling services, including rehabilitation counseling, orientation and mobility services").[2]

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[2] Petitioners insist that "they did not believe that the use of the dog was necessary for [E.F.] to benefit from her education; they thought the human aide provided in her IEP was sufficient." Pet. Reply Br. 5. But that cannot change the nature of their claims. As the Second Circuit explained in rejecting the same argument, allowing a child's service animal to accompany him to class "implicate[s]" his IEP "and would be best dealt with through the

The Sixth Circuit thus correctly held that petitioners sought "relief available" under the IDEA because "the legal injury alleged is in essence a violation of IDEA standards." Pet. App. 20; *see Charlie F.*, 98 F.3d at 992 (the "relief available" for a claim is the "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers"). Requiring exhaustion in such cases is consistent with Congress' "inten[t] to channel * * * into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Batchelor*, 759 F.3d at 275 (quoting *Polera* v. *Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002)).

B. The United States' Prudential Concerns Are Unpersuasive.

The United States contends that forcing petitioners to exhaust would be unfair and a waste of time because E.F. is no longer enrolled at respondents' school and seeks purely retrospective relief. U.S. Br. 17-18. That is not a reason to revisit the decision here for three reasons.

First, the United States' fairness arguments ignore the fact that following IDEA procedures in this case might long ago have remedied or prevented the injuries petitioners allege by allowing E.F. to attend school with her dog. "Where, as here, a full remedy

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administrative process." *Cave*, 514 F.3d at 247-248. The same is true here. *See* Pet. App. 5 (noting that allowing the dog to attend school "would almost certainly" require modifications to E.F.'s IEP).

is available at the time of injury, a disabled student claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages." *Polera*, 288 F.3d at 488. Nor is there anything in the statute to suggest that retrospective claims are not subject to exhaustion. On the contrary, the default limitations period of two years suggests Congress intended to channel claims through those procedures even where the conduct alleged to violate the IDEA had long passed. *See* 20 U.S.C. § 1415(b)(6)(B).

Second, the United States misses a key point of the administrative process when it claims it would be a "waste [of] time" to force petitioners to exhaust when they "would have had to file exactly the same suit" afterward. U.S. Br. 18. Exhaustion would have furnished the court with a record that addressed the issue at the heart of petitioners' complaint, namely whether permitting E.F.'s dog to accompany her was "necessary to avoid discrimination on the basis of disability." Pet. App. 6 (quoting 28 C.F.R. § 35.130(b)(7)); *see Batchelor*, 759 F.3d at 275 (noting that a purpose of exhaustion is "developing the record for review on appeal"). And a record of that kind is just as valuable to a court considering a civil suit that "turns on the same questions" at issue in an IDEA proceeding, whether or not it seeks only retrospective relief. *Id.* at 10.

Finally, every court to have considered the scope of section 1415(*l*) has recognized an exception where exhaustion would be futile.[3] Perhaps for strategic

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[3] *See, e.g.*, *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 52 (1st Cir. 2000); *Cave*, 514 F.3d at 249 (2d Cir.); *Batch-*

reasons, petitioners chose not to raise futility in this case. In any event, nothing in section 1415(*l*) permits a plaintiff to "evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief." Pet. App. 18; *see id.* at 17. Certiorari is not the appropriate way forward for this case; exhaustion is.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MULLINS
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084
(248) 457-7020

NEAL KUMAR KATYAL
Counsel of Record
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-6000
neal.katyal@hoganlovells.com

Counsel for Respondents

MAY 2016

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elor, 759 F.3d at 280 (3d. Cir.); *McCormick* v. *Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 568 (7th Cir. 2004); *J.B. ex rel. Bailey* v. *Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 594 (8th Cir. 2013); *Payne*, 653 F.3d at 888 n.3 (9th Cir.); *A.F. ex rel Christine B.* v. *Española Pub. Sch.*, 801 F.3d 1245, 1249 (10th Cir. 2015); *M.T.V.*, 446 F.3d at 1159 (11th Cir.); *see Honig* v. *Doe*, 484 U.S. 305, 327 (1988) (noting the availability of a futility exception under the former Education of the Handicapped Act).

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In the Supreme Court of the United States

STACY FRY, ET VIR, AS NEXT FRIENDS OF MINOR E.F., PETITIONERS

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
JESSICA WOLLAND
RHONDA WEISS
Attorneys
U.S. Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

Whether 20 U.S.C. 1415(*l*) requires petitioners to exhaust the state administrative procedures set forth in the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, before bringing their civil action seeking money damages for past violations of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

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In the Supreme Court of the United States

No. 15-497

STACY FRY, ET VIR, AS NEXT FRIENDS OF MINOR E.F., PETITIONERS

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the relationship between the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* As relevant here, the Department of Justice has authority to bring civil actions to enforce Title II of the ADA, 42 U.S.C. 12131-12165, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794 (2012 & Supp. II 2014), and it has promulgated regulations implementing Title II. See 29 U.S.C. 794a; 42 U.S.C. 12133, 12134(a); 28 C.F.R. Pt. 35. The Department of Education administers the IDEA; it has promulgated regulations implementing that statute and Section 504; it has authority to investigate and administratively enforce compliance with Section 504; and it has the au-

thority to investigate, negotiate administrative resolutions, and refer unresolved Title II matters to the Department of Justice. See 20 U.S.C. 1406(a); 29 U.S.C. 794a; 34 C.F.R. Pts. 104, 300; see also 28 C.F.R. 35.190(b)(2); 34 C.F.R. 104.61. At the Court's invitation, the United States filed a brief at the petition stage urging this Court to grant review and reverse the decision below.

STATEMENT

The question presented in this case is when the IDEA requires a litigant to exhaust the IDEA's administrative procedures before bringing a civil action under Title II of the ADA or Section 504 of the Rehabilitation Act. The court of appeals held that the IDEA can sometimes require exhaustion of such claims even when the only relief that the plaintiff seeks is not available under the IDEA. Pet. App. 6.

1. a. The ADA and Rehabilitation Act protect individuals with disabilities from discrimination. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The Department of Justice has promulgated implementing regulations requiring, *inter alia*, that a public entity make "reasonable modifications [to its] policies, practices, or procedures * * * [that] are necessary to avoid discrimination." 28 C.F.R. 35.130(b)(7). As relevant here, the regulations also generally provide that such entities "shall modify [their] policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 C.F.R. 35.136(a). Title II authorizes

private citizens to bring suits for money damages to redress violations of its requirements. *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004).

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a); see 28 C.F.R. 41.51(a); 34 C.F.R. 104.4(a). Section 504 served as a model for Title II of the ADA, and the same liability standards generally apply to both statutes. See, *e.g.*, 42 U.S.C. 12201(a). The Rehabilitation Act authorizes private citizens to bring suits for money damages to redress violations of Section 504. See *Lane*, 541 U.S. at 517; see also 29 U.S.C. 794a(a)(2).

b. The IDEA (formerly known as the Education for All Handicapped Children Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). States and school districts receiving IDEA funds must make a "free appropriate public education" (FAPE) available to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1401(9) (defining FAPE).

As the "centerpiece" of the FAPE requirement, school districts must provide each eligible child with an "individualized educational program" (IEP). *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). A proper IEP must establish a program of special education and related services that is designed to meet the "unique needs" of the child. *Ibid.*; 20 U.S.C. 1412(a)(4); 34 C.F.R. 300.22, 300.34.

The IDEA requires school districts to work collaboratively with parents to formulate an appropriate IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368-369 (1985) (*Burlington*).

As a general matter, parents who are not satisfied with a proposed IEP, or with other matters relating to the "identification, evaluation, or educational placement of the child, or the provision of a [FAPE]," must first notify the school district of their complaint. 20 U.S.C. 1415(b)(6); see 20 U.S.C. 1415(b)(7). If the dispute cannot be resolved through established procedures, the parents may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A)-(B); see 20 U.S.C. 1415(g) (authorizing administrative appeal to state educational agency if initial hearing is conducted by local agency). The hearing officer in such proceedings must make the decision "on substantive grounds based on a determination of whether the child received a [FAPE]." 20 U.S.C. 1415(f)(3)(E)(i).

The IDEA permits a party aggrieved by the hearing officer's decision to file a civil action under the IDEA. 20 U.S.C. 1415(i)(2)(A). Although "judicial review is normally not available" under the IDEA "until all administrative proceedings are completed," "par-

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B), (3)(A)(ii), (D), (4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

ents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig*, 484 U.S. at 326-327 (interpreting 20 U.S.C. 1415(e)(2) (1982), the predecessor to 20 U.S.C. 1415(i)(2)(A)); see Supp. Br. in Opp. 9 & n.3; see generally *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992) (stating that an administrative remedy is "inadequate" when the agency "lack[s] authority to grant the type of relief requested").

A court adjudicating an IDEA case must receive the records of any prior administrative proceedings, and it may hear additional evidence before rendering its decision. 20 U.S.C. 1415(i)(2)(C). In deciding the case, the court must give "due weight" to the result of any state administrative proceedings. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982).

The IDEA empowers courts hearing IDEA cases to "grant such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). This Court and the courts of appeals have generally recognized that the relief available under the IDEA is equitable in nature and encompasses both (1) future special education and related services that ensure a FAPE or redress past denials of a FAPE, and (2) financial compensation to reimburse parents for past educational expenditures that should have been borne by the State. See, *e.g.*, *Burlington*, 471 U.S. at 369-370. The Court has expressly distinguished such relief from compensatory "damages," *id.* at 370-371, and it has further made clear that the IDEA does "not allow for damages," *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 254 n.1 (2009).[2]

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[2] See, *e.g.*, *Polera* v. *Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 485-486 (2d Cir. 2002) (citing cases);

c. In *Smith* v. *Robinson*, 468 U.S. 992 (1984), this Court held that the IDEA's predecessor statute was the *exclusive* means of seeking relief for claims alleging the violation of rights to special education specifically guaranteed by that statute. *Id.* at 1012-1013, 1019-1021. The Court accordingly rejected the plaintiffs' effort to rely on the Equal Protection Clause and Section 504 as alternative means of vindicating a child's IDEA-protected educational rights. *Ibid.*

Congress overturned *Smith* by enacting the Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99-372, 100 Stat. 796. Section Three of that statute, 100 Stat. 797—now codified at 20 U.S.C. 1415(*l*)—was intended to "reaffirm * * * the viability of [S]ection 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985) (House Report) (explaining goal of overruling *Smith*); see *id.* at 6-7 (same); S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985) (same).

Section 1415(*l*) provides, in relevant part, as follows:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act of 1973 [including Section 504], or other Federal laws protecting the rights of children with disabilities, except that *before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the*

Charlie F. v. *Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 991 (7th Cir. 1996).

> *[administrative] procedures under [the IDEA, 20 U.S.C. 1415(f) and (g)] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].*

20 U.S.C. 1415(*l*) (emphasis added).

The portion of Section 1415(*l*) italicized above sets forth the circumstances in which a plaintiff bringing suit under the ADA or Section 504 must first exhaust administrative remedies under the IDEA. That exhaustion requirement is the subject of the question presented in this case.

2. E.F. is a child with a severe form of cerebral palsy that substantially limits her motor skills and mobility. Resp. App. 6; Pet. App. 3.[3] In the 2009-2010 school year, E.F. attended kindergarten at Ezra Eby Elementary School (Ezra Eby), which is within the Napoleon Community Schools and Jackson County Intermediate School District (respondents here, along with the principal of Ezra Eby, Pamela Barnes). Resp. App. 5; Pet. App. 4.

In 2009, pursuant to a prescription from E.F.'s doctor, E.F.'s parents and E.F. (collectively, petitioners) obtained Wonder, a trained service dog, to assist E.F. with various functions of ordinary life. Resp. App. 2, 6-7; Pet. App. 3-4. In the fall of 2009 and again in January 2010, respondents informed petitioners that E.F. could not bring Wonder to school. Resp. App. 2, 8; Pet. App. 4. At the time, respondents had a policy that permitted an individual's use of a guide dog in school, but they refused to modify that policy to allow

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[3] The facts discussed in this brief are drawn from petitioners' complaint and the discussion of the complaint in the decisions below.

service animals (like Wonder) more generally. See Resp. App. 3, 9; Pet. App. 27.

In April 2010, respondents permitted E.F. to attend school with Wonder for the remainder of the school year. Resp. App. 8; Pet. App. 4. During that time, however, respondents limited E.F.'s use of Wonder, thereby preventing E.F. from participating in certain school activities. Resp. App. 8-9; Pet. App. 4. At the end of the school year, respondents informed petitioners that they would not allow Wonder to accompany E.F. to school during the 2010-2011 school year. Resp. App. 9; Pet. App. 4.

In response, E.F.'s parents removed E.F. from Ezra Eby and home-schooled her for the 2010-2011 and 2011-2012 school years. Resp. App. 9; Pet. App. 4. E.F.'s parents also filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) alleging that respondents had violated Title II and Section 504. Resp. App. 9; Pet. App. 4.

In May 2012, OCR determined that respondents' denial of E.F.'s use of her service dog violated both statutes. J.A. 18-19; Resp. App. 10; Pet. App. 4. In particular, OCR concluded that barring E.F. from using a service animal inappropriately inhibited her independence and thus violated Title II and Section 504's general antidiscrimination requirements. J.A. 35-36. OCR explained that the school's conduct was analogous to "requir[ing] a student who uses a wheelchair to be carried [by school personnel]" or "requir[ing] a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane," both of which would likewise "violate the antidiscrimination provisions of Section 504 and Title II." J.A. 35.

In response to OCR's decision, respondents agreed to allow Wonder to accompany E.F. to school. Resp. App. 10; Pet. App. 4. But after E.F.'s father met with Principal Barnes to discuss E.F.'s return to Ezra Eby, her parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." Resp. App. 10. They accordingly found a different public school—in a different district—that welcomed E.F. and Wonder. Resp. App. 10-11; Pet. App. 4. E.F. enrolled in that school the following fall. Resp. App. 10-11.

3. In December 2012, petitioners sued respondents for violating Title II of the ADA and Section 504 of the Rehabilitation Act. Resp. App. 1-22. They alleged that respondents had unlawfully refused to modify their policies to permit E.F. to use her service animal at school between "fall 2009 and spring 2012." Pet. App. 4-5; see Resp. App. 12-19. Petitioners further alleged that E.F. had suffered harm as a result of the discrimination, including "emotional distress and pain, embarrassment, mental anguish, inconvenience, and loss of enjoyment of life." Resp. App. 11-12. In their prayer for relief, petitioners sought a declaration that respondents had violated both statutes, damages to compensate for the harm suffered by E.F., attorneys' fees, and "any other relief [the district] Court deems appropriate." *Id.* at 21. The complaint did not mention the IDEA, allege that E.F. had been denied a FAPE, or seek damages to remedy any violation of that or any other IDEA requirement.

In January 2014, the district court dismissed petitioners' complaint without prejudice under Federal Rule of Civil Procedure 12(c). Pet. App. 37-52. The court held that petitioners had failed to comply with

the IDEA's exhaustion provision, 20 U.S.C. 1415(*l*), insofar as they filed the action without first challenging E.F.'s IEP in accordance with the IDEA's administrative procedures. Pet. App. 5, 42-50.

4. A divided panel of the court of appeals affirmed. Pet. App. 1-20.

a. The panel majority interpreted Section 1415(*l*) to "require[] exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6; see *id.* at 3, 10-11 (similar formulations). It explained that petitioners' suit must be dismissed because "[t]he core harms that [petitioners] allege arise from the school's refusal to permit E.F. to attend school with Wonder relate to the specific educational purpose of the IDEA" and because petitioners "could have used IDEA procedures to remedy th[o]se harms." *Id.* at 6; see *id.* at 10-14, 16.

The panel majority acknowledged that petitioners' action sought money damages and that such damages are "unavailable" under the IDEA. Pet. App. 17. It also acknowledged that the IDEA procedures "could *at best* require Ezra Eby Elementary to permit Wonder to accompany E.F. at school," and that such an outcome "would *not* at present be effective in resolving [petitioners'] dispute," both because petitioners no longer sought to enroll E.F. at Ezra Eby and because respondents had already agreed to permit Wonder to accompany E.F. to Ezra Eby following the OCR's 2012 ruling. *Ibid.* (emphases added). The panel majority nonetheless held that the request for money damages "does not in itself excuse the exhaustion requirement," because that would allow plaintiffs to evade that requirement "simply by appending a claim

for damages." *Ibid.* (citation and internal quotation marks omitted).

b. Judge Daughtrey dissented. Pet. App. 21-35. In her view, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA.*" *Id.* at 28 (citation omitted; brackets in original).[1]

SUMMARY OF ARGUMENT

Section 1415(*l*) does not require a plaintiff bringing a Title II or Section 504 claim to exhaust the IDEA's administrative process unless that process is capable of providing the plaintiff with the relief that he actually seeks. The decision below should therefore be reversed.

A. Section 1415(*l*) states that a plaintiff bringing a non-IDEA claim is only required to exhaust the IDEA's administrative process if his "civil action" is "seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). The statutory language does not require exhaustion when the only relief that the plaintiff requests cannot be awarded—as a matter of law—in IDEA administrative proceedings. Because compensatory damages may not be awarded under the IDEA, exhaustion is not required when a plaintiff seeks only that form of relief.

That interpretation of Section 1415(*l*) is consistent with the ordinary dictionary definitions of the relevant statutory terms, with the Federal Rules of Civil Procedure, and with this Court's analysis of similar language in other contexts. It is also consistent with the Court's especially rigorous enforcement of the text of

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[1] The court of appeals denied rehearing en banc, with Judge Daughtrey dissenting. Pet. App. 53-54.

statutory exhaustion provisions. Just last Term, the Court made clear that when Congress conditions an exhaustion requirement on whether the particular form of relief "sought" by the plaintiff is "offered" by the statute, exhaustion is not required when the plaintiff only seeks relief that is *not* offered. *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016) (citation omitted). That same principle applies here, where Section 1415(*l*) requires exhaustion only if the plaintiff's civil action is "seeking" relief that is "available" under the IDEA.

Other language in Section 1415(*l*) confirms that exhaustion is not required when the plaintiff cannot obtain his desired relief in IDEA proceedings. Section 1415(*l*) requires exhaustion of non-IDEA claims only "to the same extent as would be required" if the claim had been brought under the IDEA. 20 U.S.C. 1415(*l*). But this Court has explained that IDEA claims need not be exhausted when the administrative remedy is "inadequate." *Honig* v. *Doe*, 484 U.S. 305, 326-327 (1988). It has also explained that a form of relief is "inadequate" when the agency "lack[s] authority to grant the type of relief requested." *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992). Section 1415(*l*)'s "to the same extent" language thus provides an additional (and overlapping) textual reason that exhaustion is not required when a non-IDEA claim seeks relief that is not available in IDEA proceedings.

The court of appeals held that, even though petitioners sought monetary relief—and even though that relief is "unavailable" under the IDEA—petitioners were required to exhaust. Pet. App. 17. The court reasoned that Section 1415(*l*) requires exhaustion whenever the plaintiff's injuries (1) can be remedied to any extent through IDEA procedures or (2) relate to the

IDEA's substantive protections. *Id.* at 6. That test does not square with the statutory language, which instead requires exhaustion only if the plaintiff "seek[s] relief" that the IDEA makes "available." 20 U.S.C. 1415(*l*). Congress chose its words carefully, and it decided not to adopt a broader exhaustion requirement such as the one endorsed by the court of appeals or set forth in the Prison Litigation Reform Act, 42 U.S.C. 1997e. See 42 U.S.C. 1997e(a) (requiring exhaustion of whatever administrative remedies "are available," regardless of what relief plaintiff actually seeks).

B. Section 1415(*l*)'s legislative history confirms that the statutory text means what it says. The House Report on what is now Section 1415(*l*) makes explicit that exhaustion is not required when "*the [IDEA] hearing officer lacks the authority to grant the relief sought.*" House Report 7 (emphasis added). That rule implements Section 1415(*l*)'s overarching purpose of overturning *Smith* v. *Robinson*, 468 U.S. 992 (1984), and "reaffirm[ing] * * * the viability of" other anti-discrimination provisions as "separate vehicles for ensuring the rights of handicapped children." House Report 4.

C. Section 1415(*l*)'s carefully tailored exhaustion rule reflects a sound policy choice consistent with established exhaustion principles. By declining to require exhaustion when the plaintiff seeks relief that cannot be obtained in IDEA administrative proceedings, Congress allowed parents, school districts, and state educational agencies to avoid a potentially burdensome administrative proceeding that is incapable of resolving the underlying dispute. That choice is consistent with the settled rule—recognized in *McCar-*

thy and other decisions by this Court—that exhaustion is generally not required when the agency lacks authority to provide the plaintiff with the relief that he seeks.

This case illustrates the unsound practical consequences that flow from the court of appeals' flawed interpretation of Section 1415(*l*). Here, (1) petitioners concede that E.F.'s IDEA rights were not violated, (2) E.F. has no ongoing educational relationship with respondents, and (3) petitioners seek only relief that the IDEA does not authorize. Exhaustion makes little sense, because there is no prospect that the IDEA administrative process could ever resolve the parties' dispute.

The court of appeals justified its interpretation almost entirely by reference to policy arguments. But such arguments cannot trump the statutory text, which strikes a balance between Congress's various goals of reaffirming the viability of non-IDEA causes of action, promoting efficiency, and protecting the role of state educational agencies. In any event, the court's policy arguments are overstated: The court's interpretation would appear to require exhaustion even in circumstances where there is no threat to the state educational agency's authority over a child's ongoing educational program and when there is little (if any) prospect that the administrative process would generate a useful record that could assist in subsequent litigation. And the court's fear that plaintiffs will be able to evade the IDEA's administrative process even when they seek relief that *is* available under the IDEA is unfounded.

D. Here, petitioners' Title II and Section 504 claims seek money damages and other forms of relief

that are not available under the IDEA. The court of appeals thus erred in dismissing those claims for failure to exhaust. This Court should accordingly reverse the decision below.

ARGUMENT

THE IDEA DOES NOT REQUIRE ADMINISTRATIVE EXHAUSTION OF NON-IDEA CLAIMS SEEKING ONLY RELIEF THAT IS UNAVAILABLE UNDER THE IDEA

A. Section 1415(*l*)'s Text Establishes That Exhaustion Is Not Required When The Administrative Process Cannot Provide The Requested Relief

The IDEA is not the exclusive mechanism for vindicating the rights of children with disabilities through litigation. Section 1415(*l*) expressly contemplates that aggrieved parties may invoke other statutes—including Title II of the ADA and Section 504 of the Rehabilitation Act—to secure relief for a violation of the substantive standards established in those statutes. 20 U.S.C. 1415(*l*).

Section 1415(*l*) places a single restriction on such non-IDEA litigation: It states that potential litigants must exhaust the IDEA's administrative procedures "before the filing of a *civil action* under [Title II, Section 504, or other specified] laws *seeking relief that is also available* under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). Even then, Section 1415(*l*) requires exhaustion only "*to the same extent* as would be required had the action been brought under [the IDEA]." *Ibid.* (emphasis added). Section 1415(*l*) does not require a plaintiff to exhaust the IDEA's administrative process when that process is incapable of providing the relief that he seeks in a non-IDEA action.

1. Exhaustion is required only if a plaintiff's action "seek[s] relief" that is "available" under the IDEA

By its plain terms, Section 1415(*l*)'s exhaustion requirement applies only to non-IDEA "civil action[s] * * * seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). Exhaustion is therefore not required when the civil action in question seeks relief that cannot be obtained under the IDEA's remedial scheme. Because compensatory damages cannot be obtained under the IDEA, a plaintiff who seeks only such damages under a different statute is not required to exhaust that claim.

a. To determine whether any particular "civil action" triggers Section 1415(*l*)'s exhaustion requirement, a court must first determine precisely what "*relief*" that action is "*seeking*." 20 U.S.C. 1415(*l*) (emphases added). In doing so, the court must examine the complaint, with particular emphasis on the specific relief that the plaintiff has asked the court to award.

That straightforward approach follows from the ordinary meaning of the verb "seek," which is "to try to obtain," "to ask for," and "[to] request." *Random House Webster's Unabridged Dictionary* 1733 (2d ed. 2001) (*Random House*); see, *e.g.*, *Webster's Ninth New Collegiate Dictionary* 1063 (1985) ("to ask for," "[to] request," "to try to acquire or gain") (capitalization omitted). The Federal Rules of Civil Procedure establish that the complaint is the formal instrument by which a plaintiff informs the court and the other parties of the relief he is affirmatively seeking. See Fed. R. Civ. P. 8(a)(3) (requiring a complaint to include "a demand for the relief *sought*") (emphasis added); see also Fed. R. Civ. P. 54(c) (discussing the "relief" that a party has "demanded" in its pleadings).

This Court applied a complaint-centered approach to determining whether a civil "action" is "seeking" a particular form of "relief" in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). There, the Court had to decide whether a case under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, qualified as an "action * * * seeking relief other than money damages" under the APA's jurisdictional provision, 5 U.S.C. 702. *Bowen*, 487 U.S. at 891-901. In resolving that question, the Court looked to the specific forms of relief requested in the complaint. *Id.* at 893. The Court made clear that this approach followed from the "plain language" of Section 702. *Ibid.*

This Court also treated a plaintiff's complaint as the guide to the particular relief he was "seeking" in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). There, the Court made clear that a prisoner was "seeking only money damages" because such damages were "the only relief requested by [him] in this action." *Id.* at 152; see *id.* at 142 (noting that complaint stated that "This Complaint seeks Money Damages Only") (citation omitted).

b. Once a court applying Section 1415(*l*) looks to the complaint and identifies the "relief" the "civil action" is "seeking," the court must then determine whether that requested relief is "*available* under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). As this Court has explained, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose, and that which is accessible or may be obtained.'" *Ross* v. *Blake*, 136 S. Ct. 1850, 1858 (2016) (quoting *Booth* v. *Churner*, 532 U.S. 731, 737-738 (2001), and *Webster's Third New International Dictionary* 150 (1993)) (internal quotation marks omit-

ted); see *Random House* 142 (defining "available" as "accessible" or "readily obtainable"). Relief a plaintiff seeks is therefore not "available" to him when the IDEA does not authorize a court or state agency to award that relief in IDEA proceedings.

One circumstance in which the desired relief is plainly *not* available is when it takes the form of a particular remedy that the IDEA does not authorize. Here, the parties agree—correctly—that compensatory damages are not an "available" remedy in IDEA proceedings. Pets. Br. 5, 45; Br. in Opp. 6, 20; see Pet. App. 17. IDEA relief is equitable in nature and does not encompass compensatory damages. See p. 5, *supra* (citing cases); see generally *Florence Cnty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 12 (1993) (discussing IDEA's grant of "equitable authority"). When a plaintiff seeks only compensatory damages under a non-IDEA statute, he is therefore not required to exhaust that claim.

Although not directly implicated by petitioners' question presented, relief is also not "available under [the IDEA]" for purposes of Section 1415(*l*) if the plaintiff expressly concedes that the defendant's conduct did not violate the IDEA. IDEA relief is only "available" to plaintiffs who can establish a violation of the IDEA. See 20 U.S.C. 1415(f)(3)(E). In such circumstances, the concession makes clear that there is no dispute that the child at issue received a FAPE, and thus that there is no available remedy under the IDEA. As a result of the concession, the plaintiff can obtain relief on his non-IDEA claim only if that claim relies on substantive rights that exist independent of the IDEA and that offer different protections than those provided by that statute.

By contrast, exhaustion generally *is* required when a plaintiff both (1) seeks a form of relief that is authorized by the IDEA, and (2) does not concede that the school district has complied with the IDEA. In that circumstance, the IDEA administrative process can potentially resolve the parties' dispute.

c. This Court should embrace this straightforward interpretation of Section 1415(*l*)'s unambiguous text. As the Court has often emphasized, "when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009).

The Court has been especially rigorous in enforcing the plain meaning of statutory exhaustion provisions. "Time and time again, th[e] Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Ross*, 136 S. Ct. at 1857 (citing cases). With respect to such provisions, "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Ibid.*; see generally *McNeil* v. *United States*, 508 U.S. 106, 111, 113 (1993) (rejecting atextual interpretation of exhaustion provision and emphasizing that "[w]e are not free to rewrite the statutory text").

Last Term's decision in *Ross* provides the most recent example of this approach. There, the Court enforced the "unambiguous" text of the statutory exhaustion requirement set forth in the PLRA, 42 U.S.C. 1997e(a). 136 S. Ct. at 1856. The Court rejected the Fourth Circuit's creation of an "extra-textual exception" to that requirement and criticized that court for "ma[king] no attempt to ground its analysis in the PLRA's language." *Ibid.* (citation omitted). Notably, the Court emphasized that its strict fidelity to the text

of statutory exhaustion provisions "runs both ways" and applies whether or not it makes it harder or easier for the plaintiff to sue. *Id.* at 1857 n.1. The Court thus stressed the importance of rigorously enforcing an *exception* to exhaustion that Congress had "baked into [the PLRA's] text." *Id.* at 1862. And it reiterated that imposing "extra-statutory limitations on a prisoner's capacity to sue" "exceeds the proper limits on the judicial role." *Id.* at 1857 n.1 (citation omitted).

d. *Ross* is especially significant because the Court carefully distinguished Section 1997e(a)'s exhaustion provision from the sort of exhaustion provision at issue in this case. Section 1997e(a) requires prisoners to exhaust "such administrative remedies as are available" before bringing a civil action challenging prison conditions in court. 42 U.S.C. 1997e(a). The Court explained that in *Booth*, *supra*, the plaintiff had "argued that exhaustion was not necessary [under Section 1997e(a)] because he wanted a type of relief that the administrative process did not provide." 136 S. Ct. at 1857. The Court noted that it had rejected that argument because Section 1997e(a) "made no distinctions based on the particular 'forms of relief *sought* and *offered*,'" and the "legislative judgment must control." *Ibid.* (emphasis added) (quoting *Booth*, 532 U.S. at 741 n.6).

The plain implication of the Court's analysis is that the *Booth* plaintiff would have prevailed—and exhaustion would *not* have been required—if the applicability of Section 1997e(a) *had* turned on the forms of relief "sought and offered." That is precisely the case here: Unlike the PLRA, Section 1415(*l*) only requires exhaustion when the plaintiff is "seeking" relief that is "available" under the IDEA process. As in *Ross* and

Booth, the "legislative judgment must control." *Ross*, 136 S. Ct. at 1857.

2. Section 1415(l)'s "to the same extent" language confirms that exhaustion is not required when the requested relief is not available in the administrative proceeding

The preceding argument rests entirely on Section 1415(*l*)'s statement that the exhaustion requirement applies only to "civil action[s] * * * seeking relief that is also available under [the IDEA]." But the IDEA places an additional limit on the scope of that requirement: It provides that IDEA administrative procedures must be exhausted only "*to the same extent* as would be required had the action been brought under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). That limitation confirms that exhaustion is not required when a plaintiff brings a non-IDEA claim seeking relief that is unavailable in an IDEA administrative proceeding.

To apply Section 1415(*l*)'s "to the same extent" limitation, a court must imagine a hypothetical IDEA action based on the same alleged misconduct and seeking the same relief as the non-IDEA action actually at issue. If the plaintiff in such a hypothetical action would not be required to exhaust the IDEA administrative process, exhaustion of the non-IDEA action is not required either. In that way, Congress made any exceptions to exhaustion for IDEA claims applicable to non-IDEA claims as well.

In *Honig* v. *Doe*, 484 U.S. 305 (1988), this Court interpreted the exhaustion requirement applicable to IDEA claims to incorporate the standard administrative law exceptions for cases in which exhaustion would be "futile" or the relief "inadequate." *Id.* at

326-327 (interpreting provision that is now 20 U.S.C. 1415(i)(2)(A)).[5] By adding the "to the same extent" language to Section 1415(*l*)'s exhaustion requirement for non-IDEA claims, Congress thereby incorporated the "inadequa[cy]" and "futility" exceptions that previously existed for IDEA claims.

In *McCarthy*, this Court explained that the standard exception for cases in which an administrative remedy is "inadequate" applies when the agency "lack[s] authority to grant the type of relief requested." 503 U.S. at 148 (citing cases); see *id.* at 156-157 (Rehnquist, C.J., concurring in the judgment) (agreeing with Court on this point).[6] When combined with *Honig*, that means that in an IDEA action, a plaintiff is not required to exhaust when the administrative agency cannot provide the relief requested. By virtue of Section 1415(*l*)'s "to the same extent" language, the same is also true for non-IDEA actions.

Thus, both halves of the exhaustion provision lead to the same place: First, Congress provided that exhaustion of non-IDEA claims is not required when the plaintiff is "seeking relief" that is not "available" un-

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[5] Section 1415(i)(2)(A) states that "[a]ny party aggrieved" by the final decision made in the IDEA administrative process "shall have the right to bring a civil action with respect to the complaint presented" in that process. 20 U.S.C. 1415(i)(2)(A).

[6] See *McNeese* v. *Board of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675, (1963) (holding that students need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); *Montana Nat'l Bank of Billings* v. *Yellowstone Cnty.*, 276 U.S. 499, 505 (1928) (holding that taxpayer need not exhaust administrative procedure because decisionmaker was "powerless" to grant the requested refund).

der the IDEA. And then, through Section 1415(*l*)'s "to the same extent" language, Congress made clear that the standard exceptions to exhaustion—including the exception for when the administrative process cannot provide the plaintiff's desired relief—apply to non-IDEA claims. Congress thus doubly ensured that exhaustion is not required when a non-IDEA claim seeks relief that is not available in IDEA proceedings.

3. There is no textual support for the court of appeals' interpretation of Section 1415(l)

a. The court of appeals held that even though petitioners sought compensatory damages—which are not available under the IDEA—they were nonetheless required to exhaust their claims. Pet. App. 6, 17. The court reasoned that Section 1415(*l*) requires exhaustion of the IDEA's administrative process whenever a plaintiff's alleged injuries either (1) "can be remedied" in some fashion "through IDEA procedures," or (2) "relate to the specific substantive protections of the IDEA." *Id.* at 6.

That injury-centered approach is entirely divorced from the text of Section 1415(*l*). That provision does not require exhaustion based on the nature of the injury, but instead on whether the particular "civil action" filed by the plaintiff is "seeking relief" that the IDEA makes "available." 20 U.S.C. 1415(*l*). The court's approach thus directly contravenes the statutory language.

Here, as in *Ross*, the court of appeals "made no attempt to ground its analysis in the [statute's] language." 136 S. Ct. at 1856. Instead, the court relied almost exclusively on policy considerations. The court considerably overstated the benefits of exhaustion when a plaintiff seeks relief that is not available under

the IDEA. See pp. 29-31, *infra*. But whatever those benefits may be, they do not justify a departure from the statute's text. Imposing "extra-statutory limitations on a [plaintiff's] capacity to sue" "exceeds the proper limits on the judicial role." *Ross*, 136 S. Ct. at 1857 n.1 (citation omitted).

b. Respondents rely (Supp. Br. in Opp. 6, 8) on the textual analysis of the Seventh Circuit in *Charlie F* v. *Board of Education of Skokie School District 68*, 98 F.3d 989 (1996). There, the court held that Section 1415(*l*) required exhaustion of the plaintiff's non-IDEA claims seeking only compensatory damages—a remedy that the court recognized was not available under the IDEA. *Id.* at 991-993. The court reasoned that Section 1415(*l*) "speaks of available relief, and what relief is 'available' does not necessarily depend on what the aggrieved party wants." *Id.* at 991; see *id.* at 992 (citing Fed. R. Civ. P. 54(c)). The Seventh Circuit explained that Section 1415(*l*)'s phrase "*relief available*" means "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Id.* at 992 (emphasis added). The court ultimately concluded that exhaustion is required so long as there is "relief available" under the IDEA.

The Seventh Circuit's interpretation of the two-word phrase "relief available" is correct—but it does not support that court's conclusion that exhaustion is required whenever the IDEA potentially offers the plaintiff any form of relief. Crucially, Section 1415(*l*) does not state that exhaustion is required whenever there is "relief available" under the IDEA. That approach—which Congress essentially incorporated into the PLRA, 42 U.S.C. 1997e(a)—would require exhaus-

tion if any form of administrative relief is available, even when the plaintiff specifically requests only relief that is *not* available.

Section 1415(*l*) is quite different: It conditions the exhaustion requirement on whether the plaintiff's "*civil action*" is "*seeking*" the available relief. 20 U.S.C. 1415(*l*) (emphasis added). By its terms, the applicability of the exhaustion provision turns on what the plaintiff actually requests, not on what he may be entitled to (but does not request). The Seventh Circuit's approach ignores the word "seeking" and thus contradicts the express statutory text.[7]

B. Section 1415(*l*)'s History And Purpose Reinforce The Plain Meaning Of Its Text

The legislative history and purpose of Section 1415(*l*) confirm that Congress did not intend to require exhaustion of non-IDEA claims seeking relief that cannot be awarded in IDEA proceedings.

1. Beyond the statutory text itself, the clearest indication of Congress's understanding of Section 1415(*l*) appears in the House Report on the HCPA. See House Report 7. That Report explained that the proposed statutory language that eventually became Section 1415(*l*) requires exhaustion of non-IDEA claims

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[7] The Seventh Circuit's reliance on Rule 54(c) is also misplaced. If anything, Rule 54(c) supports the plain-text interpretation of the statute by making clear that the relief the plaintiff seeks in the complaint may differ from the relief to which he is theoretically entitled under the statute. See Fed. R. Civ. P. 54(c) ("Every other final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*.") (emphasis added). Section 1415(*l*) is concerned only with the availability of the relief that the plaintiff is "seeking"—*i.e.*, the relief he "demand[s]."

in circumstances "where exhaustion would be required under [the IDEA] and the relief [the plaintiffs] seek is also available under [the IDEA]." *Ibid.* It then stated that exhaustion would not be required when "*the hearing officer lacks the authority to grant the relief sought.*" *Ibid.* (emphasis added). The House Report thus confirms that a plaintiff is not required to exhaust the IDEA administrative process if he seeks relief that cannot be awarded in that process.

2. The interpretation of Section 1415(*l*) set forth above also faithfully implements the broad purpose of that provision. The text and legislative history make clear that Congress enacted Section 1415(*l*) in order to overturn *Smith* v. *Robinson*, 468 U.S. 992 (1984), and "reaffirm * * * the viability of" other antidiscrimination provisions as "*separate* vehicles for ensuring the rights of handicapped children." House Report 4 (emphasis added); see 20 U.S.C. 1415(*l*) ("Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act of 1973 [including Section 504], or other Federal laws protecting the rights of children with disabilities, except"); see pp. 6-7, *supra*.

Smith had held that the IDEA's predecessor was the *exclusive* means of seeking relief for claims alleging the violation of rights to special education specifically guaranteed by that statute. 468 U.S. at 1012-1013, 1019-1021. By overruling *Smith*, Congress allowed plaintiffs to proceed under the ADA and Section 504—and to pursue the damages remedies that are available under those statutes—even though a damages remedy is not available under the IDEA. By requiring exhaustion only when the plaintiff's non-

IDEA action is "seeking relief" that is "available" under the IDEA, Congress gave plaintiffs the option to go directly to court if all they seek are damages under other statutes.

The exhaustion requirement confirms the "viability" of other statutes as "separate vehicles" for promoting the rights of children with disabilities by ensuring that if a plaintiff does not seek IDEA relief, he may immediately invoke other freestanding federal causes of action that likewise protect the rights of children with disabilities. Section 1415(*l*)'s text thus squarely aligns with Congress's stated objective.

C. Section 1415(*l*) Reflects A Sound Policy Choice Consistent With Established Exhaustion Principles

1. Congress's decision not to require exhaustion of the IDEA administrative process when that process cannot provide the desired relief makes sense. If the plaintiff seeks only relief that the IDEA is not capable of providing him, requiring exhaustion would force the plaintiff (and school district) to participate in a time-consuming, adversarial, and potentially costly due process hearing that will likely create unnecessary administrative burdens for all involved. The plaintiff would inevitably fail to obtain the relief he actually seeks. Only then would the plaintiff finally be permitted to file the non-IDEA claim that he wanted to bring all along—at which point the parties would begin wrangling anew over the legal questions that actually matter.

Congress quite reasonably chose not to require parents, school districts, and state educational officials to engage in a potentially burdensome administrative process that is incapable of resolving the actual dispute at hand. That policy judgment tracks common-sense principles embodied in this Court's administrative-

exhaustion cases more generally. As explained above, this Court has recognized that an administrative process is "inadequate" when the agency lacks authority to grant the relief that the plaintiff requests. *McCarthy*, 503 U.S. at 147; see *McNeese* v. *Board of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963); *Montana Nat'l Bank of Billings* v. *Yellowstone Cnty.*, 276 U.S. 499, 505 (1928).

2. This case illustrates the inefficient and illogical results that can flow from requiring exhaustion when the relief requested is not available in the administrative process. At the time petitioners filed this action, respondents had already agreed to allow Wonder to accompany E.F. to Ezra Eby for the 2012-2013 school year, and petitioners had already decided to enroll E.F. in a different school in a different district. See p. 9, *supra*. Respondents were no longer providing E.F. with an education, and petitioners did not request compensatory special education or related services. There was therefore no live dispute between the parties as to the content of E.F.'s IEP. Indeed, petitioners have made clear that they believe that E.F. received a FAPE and that respondents did not violate the IDEA. Pets. Br. 19, 44, 47.

In these circumstances, it makes little sense to require petitioners to engage in the IDEA administrative process before suing respondents. After all, there is no alleged IDEA violation for the hearing officer to adjudicate. The purpose of the IDEA administrative process is to resolve disputes over a child's ongoing educational program under the IDEA, not to adjudicate whether a school violated Title II and Section 504 at some time in the past.

Given that respondents had already agreed to allow Wonder to accompany E.F. to school—and that petitioners did not seek any further education-related services from respondents—there was no need for the IDEA process to consider whether Wonder should be part of E.F.'s IEP or whether forbidding Wonder from accompanying E.F. would deny her a FAPE. Even if petitioners had participated in the IDEA administrative process—and had prevailed on every issue—petitioners would have had to file exactly the same suit under Title II and Section 504 in order to obtain their desired relief. See Pet. App. 17 (acknowledging this point). Requiring petitioners and respondents to engage in the IDEA process as a precondition for litigating their Title II and Section 504 claims in court would waste time and resources without offering any chance of resolving their actual dispute.

3. The court of appeals concluded that requiring exhaustion furthers the goals of (1) "preserv[ing] the primacy the IDEA gives to the expertise of state and local agencies" in determining whether a child has been denied a FAPE under the IDEA, and (2) developing a record that includes "expert factfinding" and can inform any subsequent litigation in court. Pet. App. 8-10; see *id.* at 10-14. That analysis not only ignores the substantial costs of requiring exhaustion when the relief sought is not available in the administrative proceeding, it also overstates the benefits of exhaustion.

a. In cases in which the plaintiff concedes there is no violation of the FAPE requirement, exhaustion would do nothing to "preserve the primacy the IDEA gives to the expertise of state and local agencies," Pet. App. 9-10, because that primacy extends only to the adjudi-

cation of IDEA claims. Congress obviously did not intend the IDEA to establish state and local primacy over non-IDEA claims that do not turn on an adjudication of the IDEA's substantive legal standards. Nor would requiring exhaustion in such cases likely provide district courts with expert factfinding or a detailed administrative record. If the plaintiff concedes there is no IDEA violation, it is not clear why the state hearing officer would need to go through the burden and expense of developing any sort of detailed record at all; he could simply deny relief. See 20 U.S.C. 1415(f)(3)(E). Requiring exhaustion in such cases would be pointless.

b. In cases where the plaintiff seeks only money damages or other relief that is not available in IDEA proceedings, the benefits of exhaustion are uncertain. In such cases, the state hearing officer could choose to reject the plaintiff's request for that relief without developing a substantive record at all.

Even if a record were developed, it would be of limited value in a subsequent non-IDEA action. To be sure, the facts relevant to an IDEA claim will sometimes overlap with those relevant to a Title II or Section 504 claim, and in theory there could be some utility in having a state hearing officer consider those facts in the first instance, even if the officer were powerless to award the desired relief. But the chief purpose of IDEA proceedings is to determine whether a plaintiff is entitled to relief *under the IDEA*.[8] Any

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[8] See, *e.g.*, 20 U.S.C. 1415(b)(6) (envisioning that due-process complaint will set forth a "violation" of IDEA); 20 U.S.C. 1415(f)(3)(A)(ii) (requiring hearing officer to "possess knowledge of, and the ability to understand," IDEA and implementing regulations, without requiring similar knowledge or understanding

record in such proceedings would therefore principally focus on whether or not the plaintiff has established a violation of the IDEA, not on whether other statutes were violated.

Moreover, whereas Congress required courts hearing IDEA cases to receive the IDEA administrative record and to give "due weight" to its factual findings, it made no similar provision for non-IDEA cases. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982); see 20 U.S.C. 1415(i)(2)(C)(i). It thus does not appear that Congress viewed the development of an IDEA administrative record as being particularly important or useful in non-IDEA cases. Nothing in Section 1415(*l*)'s text or history suggests that Congress wanted to require exhaustion of any non-IDEA claim in which the agency's factfinding could potentially facilitate the subsequent adjudication of that claim in court.

c. In any event, it is up to Congress—not the courts—to make policy based on the perceived costs and benefits of requiring exhaustion when the relief requested is not available in IDEA administrative proceedings. And Congress concluded that the costs outweighed any potential benefits. The court of appeals had no authority to strike a different balance. *Florida Dep't. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (A court may not "substitute [its] view of . . . policy for the legislation which has been passed by Congress.").

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of ADA, Rehabilitation Act, or other statutes); 20 U.S.C. 1415(f)(3)(E)(i) (stating that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a [FAPE]").

4. In addition to its other policy arguments, the court of appeals warned that interpreting Section 1415(*l*)'s exhaustion requirement to turn on the relief actually sought would allow plaintiffs to "evade the exhaustion requirement simply by appending a claim for damages." Pet. App. 17 (citation and internal quotation marks omitted). That concern is unfounded.

Under Section 1415(*l*)'s plain language, a plaintiff who seeks relief that *is* available under the IDEA cannot avoid exhaustion simply by tacking on a request for damages. The exhaustion requirement unambiguously applies to any request for relief that is available under the IDEA, and the court would therefore dismiss any such request, while retaining jurisdiction only over the request for money damages.[9] In appropriate cases, the district court would also have discretion to defer consideration of the claim for money damages until exhaustion on the dismissed claims has been completed. See generally, *e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.").

The only plaintiffs who will be able to bypass the IDEA administrative process by filing a non-IDEA claim are thus those who are willing to forego any effort to obtain relief that is potentially available to them under the IDEA. As a practical matter, the

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[9] See, *e.g.*, *Jones* v. *Bock*, 549 U.S. 199, 219-224 (2007) (permitting dismissal of unexhausted claims and stating that when exhaustion is required before filing a civil "action," it means that "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad"); *Cassidy* v. *Indiana Dep't of Corr.*, 199 F.3d 374, 376-377 (7th Cir. 2000) (affirming dismissal of one aspect of relief sought by plaintiff).

plaintiffs who are likely to make that choice are those who either (1) do not believe that the IDEA was violated, (2) have already reached a resolution with the school providing them with whatever IDEA relief they may be entitled to receive, or (3) no longer seek IDEA services from the school district for the child at issue. Those are precisely the plaintiffs who should not be forced to exhaust a potentially burdensome, adversarial administrative process as a prerequisite to filing an inevitable civil action in court.

D. Petitioners' Title II And Section 504 Claims Are Not Subject To Exhaustion

Petitioners do not seek relief that is available under the IDEA's administrative process. As a result, their claims do not trigger Section 1415(*l*)'s exhaustion requirement. This Court should accordingly reverse the decision below.

The "REQUEST FOR RELIEF" set forth in petitioners' complaint asks the court to (1) "[e]nter judgment" in petitioners' favor as to both its Title II and its Section 504 claims; (2) "[i]ssue a declaration" stating that respondents violated E.F.'s rights under Title II and Section 504; (3) "[a]ward [E.F.] damages in an amount to be determined at trial"; (4) "[a]ward attorneys' fees pursuant to" the ADA, Rehabilitation Act, and 42 U.S.C. 1988; and (5) "[g]rant any other relief this [c]ourt deems appropriate." Resp. App. 21.

None of those forms of relief is "available under [the IDEA]." 20 U.S.C. 1415(*l*). The IDEA does not entitle a plaintiff to obtain a judgment or declaratory relief stating that the defendant violated the ADA or Section 504, and petitioners have expressly conceded that their IDEA rights were not violated. Pets. Br. 19. Nor does the IDEA entitle a prevailing plaintiff to

obtain money damages to compensate for harms suffered as a result of a violation of its substantive standards. See p. 5, *supra*. And although the IDEA authorizes an award of attorneys' fees, it does so only when the plaintiff has prevailed in an *IDEA* action. See 20 U.S.C. 1415(i)(3)(B). Here, petitioners' request for attorneys' fees is ancillary to their request for declaratory relief and money damages under Title II and Section 504, and they cannot prevail on those requests in IDEA proceedings.

The complaint's boilerplate request for "any other relief this [c]ourt deems appropriate," Resp. App. 21, cannot reasonably be construed as seeking relief available under the IDEA. The complaint makes clear that E.F. has successfully integrated into a new school outside respondents' district, and it does not demand that respondents provide future educational services, reimbursement for past educational expenses, or any other form of equitable relief available in IDEA proceedings. See *id.* at 10-12, 21; see generally pp. 9-10, *supra*.

In short, the various forms of relief that plaintiffs request are all unavailable in IDEA proceedings. Because it is plain that IDEA proceedings could not have provided them with the relief they are seeking, their Title II and Section 504 claims are not subject to exhaustion under Section 1415(*l*). The court of appeals erred in concluding otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
JESSICA WOLLAND
RHONDA WEISS
Attorneys
U.S. Department of Education

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APPENDIX

1. 20 U.S.C. 1400(d) provides:

Short title; findings; purposes

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

2. 20 U.S.C. 1412 provides in pertinent part:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

* * * * *

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

* * * * *

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with

disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

* * * * *

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of

Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully par-

ticipate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the

consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special ed-

ucation and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business

day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

* * * * *

3. 20 U.S.C. 1414 provides:

Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Request for initial evaluation

Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) Procedures

(i) In general

Such initial evaluation shall consist of procedures—

(I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

(ii) Exception

The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if—

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 1401 of

this title), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or

(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

(D) Parental consent

(i) In general

(I) Consent for initial evaluation

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

(ii) Absence of consent

(I) For initial evaluation

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

(II) For services

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.

(III) Effect on agency obligations

If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special educa-

tion and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

(iii) Consent for wards of the State

(I) In general

If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 1401 of this title) of the child for an initial evaluation to determine whether the child is a child with a disability.

(II) Exception

The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if—

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(E) Rule of construction

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(2) Reevaluations

(A) In general

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)—

(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation

A reevaluation conducted under subparagraph (A) shall occur—

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curric-

ulum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) **Additional requirements**

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) **Determination of eligibility and educational need**

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based interven-

tion as a part of the evaluation procedures described in paragraphs (2) and (3).

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—

(A) review existing evaluation data on the child, including—

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(ii) the present levels of academic achievement and related developmental needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken

reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency—

(A) shall notify the child's parents of—

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and re-

vised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to

participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on

reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of

a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at

the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate

public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of

Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropri-

ate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to

the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) **Content**

The proposal shall include—

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections[1] 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any

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[1] So in original. Probably should be "section"

group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

4. 20 U.S.C. 1415 provides:

Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

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[2] So in original. Probably should be capitalized.

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist par-

ents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis

for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the noncomplaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall

immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year,

except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be

confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decision-making authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of

the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, ex-

cept that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation

clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time

of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the

notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in place-

ment for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior

is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disabil-

ity. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pat-

tern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be

conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. § 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(l) **Rule of construction**

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with

Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

***(o)* Separate complaint**

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

5. 29 U.S.C. 794 (2012 & Supp. II 2014) provides:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the bene-

fits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined**

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

6. 29 U.S.C. 794a provides:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other

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[1] See References in Text note below.

appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

7. 42 U.S.C. 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

8. 42 U.S.C. 12201 provides in pertinent part:

Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III, or in places of public accommodation covered by subchapter III.

* * * * *

9. 28 C.F.R. 35.130 provides in pertinent part:

General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, pro-

grams, or activities of a public entity, or be subjected to discrimination by any public entity.

* * * * *

(b)(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * * * *

10. 28 C.F.R. 35.136(a) provides:

Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

11. 28 C.F.R. 41.51 provides in pertinent part:

General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, li-

censing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advan-

tage, or opportunity enjoyed by others receiving the aid, benefit, or service.

* * * * *

12. 34 C.F.R. 104.4 provides in pertinent part:

Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

* * * * *

(b)(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped person equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimi-

nation on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

* * * * *

13. 34 C.F.R. 104.33 provides in pertinent part:

Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

* * * * *

Supreme Court, U.S.
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In the

Supreme Court of the United States

STACY FRY, BRENT FRY, and EF, a minor, by her next friends STACY FRY and BRENT FRY,

Petitioners,

vs.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AUTISM SPEAKS IN SUPPORT OF PETITIONERS

GARY MAYERSON
Counsel of Record
JEAN MARIE BRESCIA
MAYERSON & ASSOCIATES
330 West 38th Street, Suite 600
New York, New York 10018
(212) 265-7200
gary@mayerslaw.com

CAROLINE J. HELLER
GREENBERG TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, New York 10166
(212) 801-9200
hellerc@gtlaw.com

DAN UNUMB
AUTISM SPEAKS LEGAL RESOURCE CENTER
1 East 33rd Street, 4th Floor
New York, New York 10016
(212) 252-8584
daniel.unumb@autismspeaks.org

Co-counsel for Amicus Curiae Autism Speaks

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Autism Speaks, founded in 2005 by Bob and Suzanne Wright,[2] is today the world's leading not-for-profit autism science and advocacy organization dedicated to increasing awareness of autism spectrum disorders; funding research into the causes and personalized treatments for autism; developing resources for every stage of life; and, advocating on behalf of affected individuals and their families. Autism Speaks, under the auspices of its Global Autism Public Health Initiative, has established partnerships in more than 70 countries on five continents to foster international research, services, and awareness. Thus, Autism Speaks is able to provide partner countries with a wealth of information and training based on evidence-based and scientifically tested "best practices."

Autism Speaks works closely with federal, state, and local governments to meet the needs of the ever-growing population of children and adults with

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[1] Pursuant to this Court's Rule 37.6 we note that no part of this brief was authored by counsel for any party, and no person or entity other than Autism Speaks, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief was filed with the written consent of all parties.

[2] The Wrights founded Autism Speaks after becoming the grandparents of a child with autism. Bob Wright is the former vice chairman of General Electric and chief executive officer of NBC and NBCUniversal. Suzanne Wright passed away on July 30, 2016 after being diagnosed with pancreatic cancer. See www.autismspeaks.org.

autism and their families for access to effective treatment, services, and supports.

1 in 68 children are currently on the autism spectrum and, each year, 50,000 Americans with autism will transition into adulthood. Accordingly, it is essential that the autism population be properly and timely supported to increase the chances for greater independence and self-sufficiency in adulthood.

Autism Speaks can offer valuable insights into the special challenges faced by students with autism and their families and the potential impact of the Court's decision on thousands of families across the nation. The result advocated by the Respondent would jeopardize the ability of parents to timely pursue claims for violations of the Constitution, the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a), the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, and other Federal laws protecting the rights of children with disabilities who seek relief only available under these laws merely because the parents may also have been able to pursue different claims for violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. The ability of parents of children with autism to timely pursue relief available only under the Constitution, ADA, Section 504, and other Federal laws protecting the rights of children with disabilities is critical to children with autism for whom extended litigation under the IDEA's protracted procedures is particularly damaging.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than 6.5 million children receive special education services annually in public school systems in the United States.[3] Approximately 520,000 of these children, or 8%, have been diagnosed with a form of autism.[4] For these children and their parents, discrimination remains all too pervasive with long-lasting effects. Discrimination may often result in withdrawal, emotional disturbance and social isolation, all of which are devastating to a child with autism whose very condition is defined with reference to deficits in communication, social interaction, and behavior.[5]

While discrimination may naturally impact a child's education and give rise to rights to some forms of relief under the IDEA, plaintiffs who seek different relief under different statutes should not be required to pursue IDEA's protracted exhaustion procedures

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[3] *See* National Center for Education Statistics, Children and Youth with Disabilities, Percentage of distribution of children ages 3-21 served under the IDEA, Part B, by disability type: School year 2013-14. Available at http://nces.ed.gov/programs/coe/indicator_cgg.asp (citing U.S. Department of Education, Office of Special Education Programs, Individuals with Disabilities Education Act (IDEA) database, retrieved September 25, 2015, from http://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc.) (accessed August 23, 2016).

[4] *Id.*

[5] *See* American Psychiatric Association. (2013). Diagnostic and Statistical Manual of Mental Disorders (5th ed.), Autism Spectrum Disorder, p.50.

when the type of relief they seek is simply not available under the IDEA.

For those with developmental disabilities such as autism, every moment counts. Their window of opportunity can shrink quickly, and the damage to the child's development may never be reversed.

Given the long delays characteristic of the exhaustion process, it is particularly pernicious to impose IDEA's exhaustion requirement on claims that, by their plain terms, are not seeking relief that can be awarded under the IDEA. The statute language does not require this nor do the dispute resolution goals underlying the exhaustion requirement since the remedy sought is unavailable under the IDEA. Moreover, faced with such delays as a precondition to being able to reach a forum that can actually award the relief they seek, many struggling families with a child diagnosed with autism may see no choice but to forgo vindicating their rights. It is the parent, not the IDEA, that is truly exhausted.

Parents of children with autism or other disabilities may need or desire to seek relief that is *not* available under the IDEA but *is* available under, among other Federal laws, Section 504 and the ADA. They should not be hindered or delayed in vindicating their rights under the Constitution, ADA, Section 504, or other applicable federal laws, when they seek remedies unavailable under the IDEA merely because the violations of those laws occur while their children are at school or result in some measure of educational harm. Thus, Autism Speaks respectfully urges the Court to rule in favor of the Petitioners and reverse the judgment of the Sixth Circuit Court of Appeals. To provide complete guidance to the lower courts,

Autism Speaks further urges that the Court's opinion be carefully crafted so as to make clear that the well-established exceptions to the exhaustion requirement remain applicable in cases seeking relief which can be awarded under the IDEA. These exceptions continue to be critical to families for whom exhaustion of administrative proceedings would be futile or cause irreparable damage.

ARGUMENT

I. PARENTS' OPPORTUNITY TO AVAIL THEMSELVES OF RELIEF THAT IS AVAILABLE ONLY UNDER THE CONSTITUTION, ADA, SECTION 504, OR OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF CHILDREN WITH DISABILITIES IS CRITICAL TO THEIR ABILITY TO OBTAIN TIMELY JUSTICE AND VINDICATION OF THEIR CHILD'S RIGHTS

Parents who choose to pursue claims for their disabled children under, among other Federal laws, ADA or Section 504, seeking remedies that are unavailable under IDEA, should be able to avail themselves of the federal courts immediately, saving years of expensive, unnecessary litigation. The recent 2016 decision of the Second Circuit in *T.K. v. New York City Department of Education*, 810 F.3d 869 (2d. Cir. 2016) is instructive here. The *T.K.* case demonstrates how the exhaustion requirement can result in years of protracted litigation, delaying the vindication of parents' and children's civil rights. The *T.K.* case focused on the experience of one public school student ("L.K.") being viciously bullied for two consecutive school years, her parents' repeated but wholly unsuccessful efforts to get school

administrators to even acknowledge that there was any bullying going on, the student's unfortunate 2008 withdrawal from the public school system and subsequent placement in a state-approved private school, and the relatively limited tuition reimbursement relief that the administrative hearing officer was empowered to order.[6]

L.K. was classified as "learning disabled" on her IEP. While L.K. was still attending public school at P.S. 6 in Manhattan, L.K. and her parents repeatedly attempted to discuss the bullying problem with school administrators, including P.S. 6 Principal Lauren Fontana. L.K.'s parents unsuccessfully attempted to initiate such discussions in the Principal's office, at L.K.'s IEP meeting, and on other occasions. The parents also sought to obtain a half dozen incident reports concerning L.K. to which P.S. 6 had referred. Each and every time, L.K.'s parents were rebuffed and stonewalled by Principal Fontana.[7]

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[6] Nearly 70 percent of children with autism spectrum disorder (ASD) experience emotional trauma as a result of being bullied. *See* Benjamin Zablotsky, BA, Catherine P Bradshaw, PhD, MEd, Connie Anderson, PhD, Paul A. Law, MD, MPH, *The Association Between Bullying and the Psychological Functioning of Children with Autism Spectrum Disorders*, 34 J. Dev. & Behavioral Pediatrics 1 (2013).

[7] Principal Fontana's disrespectful resistance continued even after L.K.'s parents filed their first appeal in the federal district court. Principal Fontana had to be ordered to appear for deposition and when she was finally under oath and asked about the incident reports that L.K.'s parents had made written requests to secure, Principal Fontana referred to those reports as the "f**king incident reports."

The New York City Department of Education's plan for 2008-2009 was to *return* L.K. to her class at P.S. 6, with the very *same* bullies who had tormented her for the two prior school years. L.K.'s parents were themselves products of the public school system, and they wanted the same experience for their daughter. However, faced with Principal Fontana's repeated stonewalling on the subject of bullying and an IEP plan that virtually guaranteed another year of bullying with absolutely no respite in sight, L.K.'s parents had no choice but to withdraw her from public school, place her in a state-approved private school, and bring an administrative proceeding under the IDEA to secure *Burlington/Carter* tuition reimbursement.

The case proceeded for nearly eight years through two separate administrative trials, two separate administrative appeals, and two appeals to the United States District Court for the Eastern District of New York. For years, until the very last phases of the litigation, the New York City Department of Education had denied flatly that there was any bullying of L.K. or any "stonewalling" of her parents. It was not until L.K.'s senior year in high school that the Second Circuit ruled that she had been bullied for two school years and that her parents had, in fact, been "stonewalled" by school administrators.

In *T.K.*, the student at least had the option to withdraw from public school and transfer to a private school that her parents had the resources to fund while the suit was pending. The child had both the means and the opportunity to escape from the hostile environment that was P.S. 6. What, however, would have happened had L.K. lived in a town without an available private school alternative that her parents

could afford? Under those circumstances, L.K. would have had no other opportunity but to stay and litigate while remaining at P.S. 6. That is where the exhaustion doctrine would be invoked and applied, causing further harm to L.K. and other students who might be targeted for bullying.

If the Court adopts Petitioners' position, parents who cannot afford to remove their children from hostile environments will, without question, be able to more timely seek relief under ADA or Section 504, among other federal laws, that is not available under the IDEA. For example, had L.K.'s parents lacked the means to remove her, under Petitioners' position, they could have filed an action in federal court under ADA or Section 504 seeking a declaratory judgment that the school district violated such laws and monetary damages against the school district for discrimination. Had L.K.'s parents been able to do so (without having such claims dismissed on exhaustion grounds), the school district might have felt compelled to be accountable early on—to discuss and address the bullying problem—rather than force the student and her parents to slog through a seven-year litigation saga while the school district continued to defend the indefensible. Autism Speaks urges that the maintenance of those additional claims could easily have changed the dynamics of non-accountability and utter disrespect demonstrated by P.S. 6's administration throughout the litigation.

It is essential that the Court provide lower courts with an unequivocal statement that if a child with a disability is seeking relief that *cannot* be obtained under the IDEA or any other statute with similar provisions, exhaustion of an administrative proceeding is not required to seek such relief. This is

particularly important for children with autism who cannot afford to languish for months or years while administrative proceedings are being exhausted. For example, if a school district prohibited an autistic child's service dog from accompanying the child to school, claiming that the dog did not qualify as a service animal, the parents should not be confined to seeking relief under IDEA merely because the child needs the service dog in school. Such litigation could take years to resolve, potentially leaving the child in school without the necessary service dog and risking regression.[8] Those same parents should have the option of seeking more timely relief in federal court by filing an action seeking a declaratory judgment that the dog qualifies as a service animal under the ADA. Such relief is unavailable under the IDEA, yet such litigation could vindicate the rights of the parents and child in a more timely fashion.

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[8] Service dogs trained to assist children with autism can help those who struggle with impulsive running, pica, self-stimulation, self-harming, mood swings, and many other issues. Danny Schoenbaechler, *Autism, Schools, and Service Animals: What Must and Should Be Done*, 39 J.L. & Educ. 455, 459-60 (2010).

II. THE COURT'S OPINION SHOULD MAKE CLEAR THAT EVEN IN THOSE CASES WHERE THE REMEDY SOUGHT IS AVAILABLE UNDER THE IDEA FEDERAL COURT'S RETAIN AUTHORITY TO WAIVE THE EXHAUSTION REQUIREMENT WHERE EXHAUSTION IS FUTILE OR WOULD RESULT IN IRREPARABLE HARM

Even as to cases where sought after relief is available under IDEA, case law has carved out important exceptions to the general rules requiring exhaustion. To provide appropriate guidance to the lower courts, Autism Speaks urges that the in rendering its opinion, the Court make clear that even in those cases where the particular remedies sought are available under the IDEA, and exhaustion would typically be required, the well-established common law exceptions to the exhaustion requirement remain fully applicable.

Exceptions to the exhaustion requirement are particularly important for children with autism. For these children and their parents, "every moment counts." *See* Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002[9] (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism do not have access to appropriate treatment); *see also County Sch. Bd. of Henrico County v. R.T.*, 433 F. Supp. 2d 692, 696 (E.D. Va.

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[9] Available at http://www.nytimes.com/2002/10/22/science/autism-therapy-is-called-effective-but-rare.html (accessed August 24, 2016).

2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children with autism can't afford to waste a second." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted). At some point, justice delayed results in justice denied.

The exhaustion requirement is not a rigid one. This Court has upheld decisions excusing administrative exhaustion based on futility; that is, exhaustion would be futile because the administrative procedures do not provide an adequate remedy. *See Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("[a]dministrative remedies that are inadequate need not be exhausted."); *Honig v. Doe*, 484 U.S. 305, 327 (1988) ("parents may bypass the administrative process where exhaustion would be futile or inadequate"). Courts of Appeal have also recognized exceptions to the exhaustion requirement where: the issue presented is a purely legal question; the administrative agency cannot grant relief (for example, due to lack of authority), and; an emergency situation, such as where exhaustion of administrative remedies would cause "severe or irreparable harm" to the litigant.[10] *See Kominos by Kominos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994); *See also Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069-70 (9th

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[10] The last exception finds support in the legislative history of the predecessor to the IDEA, the Disabilities Education Act, which states that exhaustion would not be necessary when "an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health)." H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985).

Cir. 2002) (holding that exhaustion of California's due process procedures enacted to comply with the procedures set forth in IDEA by parents of autistic child bringing complaint seeking enforcement of a final decision of California's Special Education Hearing Office (SEHO) would be futile or inadequate, and thus parents would be allowed to bring their claim directly to court, as the SEHO lacked jurisdiction to enforce its own orders); *Heldman on Behalf of T.H. v. Sobol*, 962 F.2d 148, 158 (2d Cir. 1992) (action challenging New York regulations permitting boards of education to appoint hearing officer to review child's individualized education plan fell within futility exception to IDEA exhaustion requirement because regulation implemented New York statute, thus neither New York Commissioner of Education nor assigned hearing officer had authority to alter statutory procedure); *J.G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 446–47 (2d Cir. 1987) (class action brought under Education of All Handicapped Children Act, to compel compliance with federal and state law governing identification, evaluation and placement of handicapped students, fell within established exception to doctrine of exhaustion of administrative remedies; claims were systemic in nature and litigation went far beyond and accomplished more than could have been accomplished through administrative hearings).

CONCLUSION

For the foregoing reasons, *amicus curiae* Autism Speaks respectfully requests that the Court reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

GARY MAYERSON
Counsel of Record
JEAN MARIE BRESCIA
MAYERSON & ASSOCIATES
330 West 38th Street,
Suite 600
New York, NY 10018
(212) 265-7200
gary@mayerslaw.com

CAROLINE J. HELLER
GREENBERG
TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, NY 10166
(212) 801-9200
hellerc@gtlaw.com

DAN UNUMB
AUTISM SPEAKS LEGAL
RESOURCE CENTER
1 East 33rd Street, 4th Floor
New York, NY 10016
(212) 252-8584
daniel.unumb@
autismspeaks.org

Co-counsel for Amicus Curiae Autism Speaks

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IN THE

Supreme Court of the United States

STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND ADVOCATES FOR CHILDREN OF NEW YORK IN SUPPORT OF PETITIONERS

ALEXIS CASILLAS
ALICE K. NELSON
CATHERINE MERINO REISMAN
ELLEN SAIDEMAN
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285
(844) 426-7224

SELENE ALMAZAN-ALTOBELLI
Counsel of Record
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285
(844) 426-7224
selene@copaa.org

Counsel for Amici Curiae

287675

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400, *et seq.* Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA").

COPAA brings to the Court the unique perspective of parents and advocates for children with disabilities. Many of these children experience significant challenges. Their success depends not only on the right to secure the IDEA's

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1. Pursuant to this Court's Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than the *Amici* listed here or its members made any monetary contribution to the preparation or submission of the brief. The parties both filed blanket consents for amicus curiae briefs on August 2, 2016.

guarantee of a FAPE, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

Advocates for Children of New York ("AFC") is a legal services organization that has worked with low-income families for over forty years to secure quality and equal public education services for children in New York City. AFC provides a range of direct services, including free individual case advocacy under IDEA and Section 504, and also works on institutional reform of educational policies and practices through advocacy and litigation.

Because of their work involving education of students with disabilities, *Amici* are intimately familiar with IDEA's exhaustion requirement and the profound differences and similarities of the legal claims and remedies available under IDEA and ADA/504. We are greatly concerned that parents and children should not be required to waste scarce time, money, and other resources on the unnecessary hurdle of wasteful IDEA due process hearings when there are no IDEA claims but there has been discrimination. In these circumstances, they could obtain relief for their discrimination claims more quickly, more efficiently, and with less cost by proceeding directly with their ADA/504 cases. Requiring parents to pursue due process hearings, which cannot provide them with meaningful relief, harms children. They often face discrimination and are deprived of their rights for potentially years during an unnecessary detour through IDEA due process.

SUMMARY OF ARGUMENT

IDEA is a very different statute from ADA and Section 504. Reading the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 ("HCPA"), now codified at 20 U.S.C. § 1415(*l*), to require exhaustion in all discrimination cases that deal with students or educational environments confuses and conflates the entirely different processes, standards, and purposes of these acts. Such a reading is inappropriate and erroneous.

IDEA provides a strong entitlement to an Individualized Educational Program ("IEP") with appropriate special education and related services regardless of cost to the school district. IDEA also provides strong procedural protections. There are claims for which IDEA provides appropriate remedies, and claims for which it cannot. To require exhaustion even when IDEA procedures **cannot resolve the harms at issue or provide meaningful relief** will have significant due process and practical consequences that are detrimental to students with disabilities seeking to vindicate their Section 504/ADA rights. Congress passed HCPA to ensure that students do not lose their right to bring their non-IDEA civil rights claims when they enter the schoolhouse door. Abandoning the remedy and claim centered inquiries set out in the plain language of 20 U.S.C. Section 1415(*l*) is not only erroneous, it eviscerates HCPA. Students with disabilities like E.F. who are undisputedly receiving IDEA FAPE may still have Section 504 and ADA claims that do not involve the right to receive FAPE under IDEA and are therefore not seeking relief available under it.

The Sixth Circuit's decision essentially requires exhaustion in all cases where a student with a disability raises discrimination claims related to an educational environment solely because the plaintiff happens to be a student with disabilities who may have an IEP. **Under that standard, virtually all Section 504/ADA claims involving public school students would require exhaustion under IDEA, a different statute.** This is at odds with plain statutory language and the clear legislative intent, and will create onerous, time-consuming, expensive, and confusing procedural hurdles that will hinder families in vindicating distinct ADA/504 rights.

ARGUMENT

I. FAMILIES OF CHILDREN WITH DISABILITIES WILL NOT FOREGO THE ROBUST IDEA PROTECTIONS WHEN SAID PROTECTIONS ARE ACHIEVABLE AND APPROPRIATE

The Sixth Circuit warned that students with disabilities and their families would "evade the exhaustion requirement [of 20 U.S.C. § 1415(*l*)] simply by 'appending a claim for damages." *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 630 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016). This concern lacks empirical support and ignores practical realities.

A. IDEA provides thorough and detailed requirements for substantively appropriate special education and related services that provide meaningful remedy in many cases

IDEA confers upon students with disabilities "an enforceable substantive right to public education...."

Honig v. Doe, 484 U.S. 305, 310 (1988). As this Court has explained, the statute "represents an ambitious federal effort to promote the education of handicapped children, and was enacted in response to Congress' perception that a majority of handicapped in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 178 (1982). IDEA provides detailed requirements for the development of an appropriate IEP for every student and procedural protections when school districts fail to follow statutory and regulatory directives. In 2011-12, more than six million students with disabilities had IEPs.[2]

IDEA and its implementing regulations often provide unambiguous mandates. For example, if a child in elementary school has a deficit in reading fluency skills, she is entitled to special education to remedy that deficit. *See, e.g., Doe v. Cape Elizabeth Sch. Dist.*, No. 15-1155, 2016 WL 4151377 (1st Cir. Aug. 5, 2016). If a child needs assistance with catheterization, the school will be required to provide nursing services. *Accord Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883 (1984). If a child is nonverbal and therefore needs an augmentative communication device to communicate, IDEA requires that the school provide the device and appropriate training. *See Bd. of Educ. v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at *25 (N.D. Ill. Aug. 15, 2005) (district complied with IDEA by performing evaluation and providing augmentative

2. U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2011-12 http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 (last visited August 26, 2016).

communication devices to meet nonverbal student's needs). And, if a child needs a residential educational placement to benefit from education, the school district is required to fund the placement, transportation, and any other necessary supports. *See M.S. v. Utah Sch. for Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016). As the above cases show, IDEA is a powerful entitlement statute because it "requires school districts to provide the individualized services necessary to get a child to that floor [of access to education]," but what sets IDEA apart is that school districts must meet that mandate "regardless of the costs, administrative burdens, or program alterations required." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013). In contrast, under ADA/504, civil rights statutes, school districts are excused from "tak[ing] any action that . . . would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164 (2015). Thus while this Court has rejected cost as a basis for denying a ventilator-dependent student continuous one-on-one nursing services during the school day, finding that cost was not a factor in construing the term "related services" in the IDEA context, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 77 (1999), a school district would argue that a family would have had less protections to pursue such a remedy under ADA/504 per 28 C.F.R. §35.164.

IDEA also contains unequivocal "stay put" protections that preclude school districts from making program and placement changes without approval by the parents. *See, e.g., Honig*, 484 U.S. 305; *Douglas v. Calif. Office of Hearings*, No. 15-15261 2016 WL 2818995, at *2. (9th Cir. May 13, 2016)(ALJ has authority to order medically

necessary occupational services necessary for special education benefit as compensatory education); *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 115 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2022 (2016). Similarly, IDEA prevents the exclusion from education by suspension or expulsion of a child with a disability for manifestations of that disability. It outlines extensive protections and procedures to ensure discipline is not used as a way to deny children with disability access to their education. *See* 20 U.S.C. § 1415(k); *Dist. of Columbia v. Doe*, 611 F.3d 888, 890-91 (D.C. Cir. 2010).

Amici, having experience with tens of thousands of children in special education matters, know well that IDEA is a uniquely powerful statute that can and does provide children with significant entitlements. When denied those entitlements, parents and students with disabilities will not forego these remedies and evade exhausting administrative remedies for other legal claims unless such exhaustion cannot lead to the type of remedy they require.

B. IDEA provides significant remedies for statutory and regulatory violations which will be accessed when they are applicable

Requiring exhaustion only in cases where a school district has violated IDEA and an educationally related remedy is available and necessary to rectify the educationally-related harm is consistent with HCPA. Mandating exhaustion when there is no available administrative remedy, however, transforms the HCPA from a guarantee of access for protection of civil rights to a barrier to access.

Beyond the substantive requirements for programming contained within IDEA it also confers upon courts and administrative hearing officers broad equitable authority to provide appropriate educationally related relief. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Such relief "would include a prospective injunction directing the school officials to develop and implement at public expense an [appropriate] IEP." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1980). For those children whose parent have the means and the opportunity to provide special education and/or related services for their children while pursuing an IDEA remedy, relief could include reimbursement of funds spent on unilateral placements and services. *Id.*; *Forest Grove*, 557 U.S. at 240; *Leggett v. Dist. of Columbia*, 793 F.3d 59, 63-64 (D.C. Cir. 2015) (awarding placement at residential school that met student's needs when school district failed to identify alternative appropriate placement). For children whose parents are unable to afford or find alternative services, relief includes compensatory education. *L.O. v. N. Y. C. Dep't of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016); *M.S.*, 822 F.3d at 1136; *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016) (remanding for calculation of compensatory education to ensure that student is in educational position he would have achieved absent the denial of FAPE); *See Douglas*, 2016 WL 2818995, at *2 (ALJ ordered compensatory education); *Doe v. East Lyme*, 790 F.3d at 454 (awarding reimbursement and compensatory education for violation of "stay put" protection). Compensatory education "may include services that would not ordinarily be available under IDEA, such as education beyond age 21." *B.D*, 817 F.3d at 800. *See also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (compensatory education under IDEA is designed to place children with

disabilities in the same position they would have occupied but for the school district's violations of IDEA); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir. 2010) (holding 24 year old student can only be fully compensated by awarding compensatory education).

In situations where a school district has failed to meet the substantive requirements of IDEA where compensatory education, or educationally related reimbursement could remedy some (if not all) of the alleged harm caused, students with disabilities are well positioned to take advantage of the administrative hearing officers' "broad equitable authority to provide appropriate relief." 20 U.S.C. §1415(i)(2)(C)(iii). And though IDEA's remedies are often meaningful, in many situations they are inappropriate and/or limited.

II. SECTION 504 AND ADA ADDRESS DISCRIMINATORY CONDUCT WITH PROCEDURES AND REMEDIES THAT ARE DISTINCT FROM AND ARE UNAVAILABLE UNDER IDEA

While IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way, Section 504 and ADA are civil rights statutes designed to end unlawful discrimination against individuals with disabilities, including students in public schools. Because the statutes were developed at different times, and with different purposes in mind, the mechanisms and remedies that have developed for each are distinct.

A. 504/ADA claims address discrimination and offer remedies not available under IDEA

Section 504 of the Rehabilitation Act was passed on September 26, 1973 and is codified at 29 U.S.C. § 701. It was the first piece of federal civil rights legislation directed at the protection of people with disabilities, and arguably paved the way for the passage of what is now known as IDEA and ADA. Section 504 is an antidiscrimination statute which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794. Unlike the IDEA (which was enacted a few years after), Section 504 prohibits discriminatory conduct, policies, and programs, but creates no affirmative obligation on entitlements to ensure people with disabilities access.

In 1990, Congress passed the Americans with Disabilities Act, a landmark law protecting the rights of individuals with disabilities. Title II barred discrimination by public entities, including school districts.

In drafting ADA to be a comprehensive statute protecting people with disabilities from discrimination, Congress paid careful attention to the various civil rights laws that it had previously passed. Thus, Title I of ADA, employment, follows the same format as Title VII of the Civil Rights Act of 1964; employees who are covered by ADA must file complaints first with EEO agencies, just like employees who are covered by Title VII. Title III of ADA is modeled after Title II of the Civil Rights Act of

1964; in light of the extensive litigation over the definition of public accommodation, Congress provided a far more detailed definition of public accommodation. *Compare* 42 U.S.C. § 12181(7) *with* 42 U.S.C. § 2000a(b)&(c).

Like Section 504, in Title II of ADA, Congress prohibited discrimination by public agencies. Title II goes beyond Section 504 in applying to state and local government agencies regardless of whether they receive any federal funds; while Section 504 applies to private schools and other private businesses that receive federal funds. Because public schools receive federal funds and are public agencies, public schools are subject to the requirements of both Title II of ADA and Section 504.

Unlike IDEA, however, the scope of Section 504 and ADA is much broader, particularly for specific disability-related areas. In fact, ADA includes a mandate to eliminate discrimination against individuals with disabilities, and it required the U.S. Department of Justice to promulgate regulations to implement ADA to that end. 42 U.S.C. § 12134. Thus while IDEA may set the "basic floor of opportunity," ADA/504 may require more. To achieve that end, inclusive in both ADA and Section 504 is the ability to pursue damages to make victims of discrimination whole, and also to disincentivize discrimination at an institutional level. As such, the purpose and scope of remedy for these statutes differ.

B. ADA imposes different substantive obligations than IDEA

A good example of how ADA can impose a higher obligation on an agency to a person with a disability is

found in the case of *K.M. v. Tustin*. In that case, a student who was deaf sought Communication Access Real-time Translation services—an accommodation that provides word-for-word transcription—to enable her to follow classroom instruction. The district in that case declined to provide her with such supports and instead offered her different supports which did not provide her with the type of word-for-word transcription she felt she needed to be able to access instruction. *K.M. v. Tustin*, No. 10-1011, 2011 WL 2633673 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013).

Under the *Rowley* analysis, the District's failure to provide the CART services was deemed to not have denied K.M. a FAPE because "[u]nder the *Rowley* 'educational benefit' standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her." *Id.* at *12. However, ADA and DOJ regulations regarding effective communications provide a completely different legal claim, and a good one at that. Those regulations require that communication be made equally accessible to people with communication disabilities, regardless of whether equal access is necessary for the child to benefit from education under *Rowley*. *See, e.g., K.M. ex rel. Bright* 725 F.3d at 1098.

In *K.M.*, the Ninth Circuit recognized that IDEA sets the "floor of access to education," while Title II and its implementing regulations "require public entities to take steps toward making existing services not just accessible, but *equally* accessible to people with communication disabilities." The court did "not find in either statute an

indication that Congress intended the statutes to interact in a mechanical fashion in the school context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied." *Id.* at 1092.

A student with similar facts as Amy Rowley, whose IDEA claim is foreclosed by binding precedent from this Court, should be able to bring her ADA/504 effective communication claim in federal court without exhausting IDEA administrative remedies—particularly given that there will be cases where it is clear there is no denial of FAPE, as students with disabilities risk sanction for bringing cases that are not meritorious. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II) (allowing awards of reasonable attorneys' fees and costs to school districts when students with disabilities are found to have filed cases that are "frivolous, unreasonable, or without foundation.").

C. Congress chose not to impose an exhaustion requirement on 504/ADA claims

Unlike IDEA, which requires IDEA claims be heard by an independent hearing officer prior to any suit being brought before a state or federal court, Section 504's federal regulations do not require administrative due process exhaustion prior to bringing suit in federal court. *Compare* 20 U.S.C. § 1415(f)(3)(A) *with* 34 C.F.R. § 104.36 (2015). There are also other significant procedural differences in bringing forth cases under IDEA and Section 504, *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011). For example, while documents and experts need to be exchanged at least 5 days before an IDEA due process hearing, there is no such requirement for a Section 504 hearing. *Compare* 20 U.S.C. § 1415(f)(2) *with* 34 C.F.R. § 104.36.

Congress was familiar with IDEA, yet it chose not to require exhaustion of administrative remedies for all Title II or Section 504 claims involving public elementary and secondary education. Just as it provided for all Title I ADA[3] claims to be filed first with EEO agencies, it could have required all Title II ADA claims involving public elementary and secondary education claims to be brought first in the same due process proceedings provided for IDEA claims. It chose not to do so, but instead later amended HCPA to provide that ADA claims, like Section 504 claims, could be brought separately and without IDEA exhaustion unless they seek the same relief available under IDEA. *See* Individuals with Disabilities Education Act Amendments Act of 1997, 105 Pub. L. No 17, 111 Stat. 37. But beyond that, ADA regulations do not set out any due process procedures for ADA claims. Instead, apart from § 1415(*l*) Congress used the same format for ADA education claims as it did with Title VI and Title IX of the Civil Rights Act, which bar discrimination on the basis of race and national origin and sex, and allow individuals with disabilities to bring suit in federal court directly, without any administrative exhaustion. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 n.41 (1979) (noting Title VI does not provide for exhaustion of administrative remedies).

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3. Notably, in Title I, of ADA, Congress required that coordination of ADA and Section 504 employment claims to "prevent imposition of inconsistent or conflicting standards," 42 U.S.C. § 12117(b), but did not provide any similar statutory requirement that ADA/Section 504 claims be consistent with IDEA claims.

Because Section 504 and ADA and civil rights statutes are designed to protect all individuals with disabilities, they cover all students who are eligible for IDEA, but they also cover other students with disabilities, students who do not need special education under IDEA. Thus, while all students who are IDEA-eligible are also Section 504-eligible by virtue of having a disability that significantly impairs their ability to learn, there are many students with disabilities under Section 504 and ADA who do not need special education and, therefore, are not eligible for IDEA. Some such students may choose to have Section 504 plans; there were 738,477 students on Section 504 plans without an IEP.[4]

III. MISAPPLYING SECTION 1415(*l*) TO REQUIRE EXHAUSTION FOR ALL EDUCATIONALLY-RELATED DISCRIMINATION CLAIMS UNLAWFULLY CONSTRICTS THE CIVIL RIGHTS OF INDIVIDUALS WITH DISABILITIES WHO ARE ENROLLED IN PUBLIC SCHOOLS

A. Congress passed §1415(*l*) to provide greater protections to IDEA-eligible Students, not detract from their civil rights

The legislative history of IDEA, Section 504, and ADA make clear that Congress understood that, while there would be significant interplay between these three statutes, they were complementary and not identical. Thus, there would be non-IDEA legal claims under Section 504 and ADA that would not require exhaustion of IDEA administrative remedies.

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4. http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12

Two years after it passed Section 504, Congress passed the Education for All Handicapped Children Act ("EHA"), IDEA's predecessor, which required education of all students with disabilities. P.L. 94-142 (1975). As discussed above, Congress passed this law because of its concern that students with disabilities were either being excluded from school or "sitting idly in regular classrooms." *See Rowley*, 458 U.S. at 179.

Due to the absence of a statute providing that Section 504 applied to EHA-eligible students and the comprehensive nature of EHA this Court restricted civil rights of EHA-eligible children in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* involved a student, who had brought identical claims under the EHA and Section 504 claims and had been awarded attorney's fees under Section 504. The Court held that the EHA provided the exclusive avenue of relief for appropriate education claims. Thus, the plaintiff in *Smith* could not assert a claim for attorney's fees either under Section 504 or under 42 U.S.C. § 1983. The Court "emphasize[d] the narrowness of our holding," and specifically stated that it did not apply where "the EHA is not available or where § 504 guarantees rights greater than those available under EHA." *Id.* at 1021 n.8.

Congress swiftly responded with HCPA, so as "to reaffirm . . . the viability of Section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children," and to restore attorney's fees for prevailing parents. H.R. Rep. No. 296, 99th Cong., 1st Sess. 4, 6-7 (1985); *see also* S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985).

In introducing HCPA, Senator Weicker explained that "the Court has not only misinterpreted the congressional intent underlying the EHA, but it has also frustrated Congress' intent in enacting section 504 and 1983 which I and many members of this body assumed protected the civil rights claims of handicapped children." 130 Cong. Rec. S9078 (daily ed. July 24, 1984). He said that the legislative record and "a decade of unbroken executive branch interpretation. . . by the Nixon, Ford, Carter, and Reagan administrations –reflect a consistent assumption that Public Law 94-142[5] and Section 504 were intended to be **freestanding, complementary – but not identical** -- legislative acts." *Id.* (emphasis added). He further noted that when Congress added 505(b) of the Rehabilitation Act "there was no exception made for handicapped children seeking an education." *Id.* He specifically noted "the section 504 regulations defines [sic] several crucial terms – that is, appropriate education – more broadly than does Public Law 94-142." *Id.* at S9079.

Thus, HCPA unequivocally placed a single restriction on non-IDEA litigation under Section 504 and ADA, and requires potential litigants to exhaust administrative remedies only when seeking relief that is **also available under IDEA.** HCPA's exhaustion, as amended, requirement reads, in full:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990

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5. The EHA at this time was cited interchangeably as P.L. 94-142.

> [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (alterations in original).

It was never Congress' intent that eligibility (or possible eligibility) for IDEA substantive or procedural rights would detract from the rights of individuals with disabilities under Section 504.

Roughly five years later, in adopting ADA, Congress explained that its purposes in passing ADA included providing both "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)&(2). In light of the history of *Smith* and HCPA, it is easily understood that Congress could have required the millions of public school students receiving special education through IDEA to go through IDEA administrative proceedings for *any* ADA or Section 504 claim, but it did not.[6] In enacting ADA, Congress was familiar with both

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6. Indeed, when HCPA was adopted, the National School Boards Association proposed a broad exhaustion requirement for all

IDEA and HCPA, yet it deliberately chose not to exclude public school students from ADA or to require exhaustion of administrative remedies for all ADA Title II claims.[7] In contrast, Congress requires that all Title I ADA claims to be filed first with EEO agencies. Rather, well aware that IDEA students would also be protected by ADA and could have different legal claims under ADA, it simply amended the HCPA and limited the exhaustion requirement to those claims seeking "relief that is also available" under IDEA. Thus, like Section 504, ADA complements IDEA, so students with IEPs receive the same robust ADA protection as other individuals with disabilities.

This legislative history is bolstered by a clear reading of the statutory text of HCPA. "Statutory interpretation . . . begins with the text." *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1856 (2016). In this case, as in *Ross*, the Court should distance itself from the Court of Appeals. The plain language of §1415(*l*), well known to the members of Congress enacting the ADA, establishes that Congress never meant to restrict the ability of an IDEA-eligible student to pursue remedies under other civil rights laws. Instead, Section 504 and ADA were intended to

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Section 504 and other federal claims if the administrative process could provide any relief. *Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 27 (May 16, 1985) (statement of Jean Arnold, Esq. ("HCPA Senate Hearing"). That Congress declined to apply such an exhaustion requirement must be heeded.

7. The analysis of rights and obligations created by the ADA and Section 504 is substantially similar. *Vinson v. Thomas*, 288 F.3d 1145, 1152 n. 7 (9th Cir.2002); *accord McGary v. City of Portland*, 386 F.3d 1259, 1269 n. 7 (9th Cir.2004).

be complementary, but distinct protections for students with disabilities that required IDEA exhaustion only in circumstances where the parents sought relief that was available under IDEA.

B. Federal courts' misapplication of §1415(*l*) to deprive students with disabilities of access to ADA/504 remedies violates the federal courts' unflagging obligation to exercise jurisdiction of federal constitutional and statutory claims

Apart from public school students, individuals with disabilities can file ADA/504 claims without worrying about that an administrative exhaustion requirement will delay a court's exercise of its original jurisdiction under 28 U.S.C. § 1331. Courts have recognized that a plaintiff asserting Section 504 claims need not be exhausted because an administrative process could not provide the requested relief.[8] *Freed v. Conrail*, 201 F.3d 188, 192 (3d Cir. 2000) (referencing cases from First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits). Similarly, Title II of ADA does not require exhaustion of remedies. *See* 28 C.F.R. § 35.172, Apx. A (according to United States Department of Justice analysis, Title II "complainant may elect to proceed with a private suit at any time").

Although HCPA restored the right of public school students who were dually covered by IDEA and Section 504 to bring Section 504 and other civil rights claims that

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8. The 1978 amendments to the Rehabilitation Act of 1973 incorporated the "remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964" for enforcing Section 504. 29 U.S.C. § 794a(a)(3).

had been eliminated by *Smith*, 468 U.S. at 1021 n.8, the Sixth Circuit's decision, if upheld, would require every public student with a disability to exhaust administrative remedies in every case, regardless of the merits of such an IDEA case. This approach only causes a denial or a delay of aggrieved students with disabilities access to court. This misapplication of §1415(*l*) is erroneous. Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). Indeed, federal courts have a "virtually unflagging obligation" to exercise jurisdiction of properly presented federal constitutional and statutory claims. *Susan B. Anthony List v. Driehaus*, __ U.S. __, 134 S. Ct. 2334, 2347 (2014); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

As discussed above, HCPA's plain language makes clear that exhaustion of IDEA administrative remedies is not required for all ADA/504 claims involving public school students, but only in the limited scenario where a student's ADA and Section 504 claims are in fact also IDEA claims 504 claims 504 claims are in fact also IDEA claims and seek relief under IDEA. Indeed, this was done because "Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under . . . other federal laws," and, as such, the only time 20 U.S.C. Section *(l)* was intended to apply was, specifically, when "that filing of a civil action under [other] laws seek[s] relief that is also available under" the IDEA. *See Payne*, 653 F.3d at 872. The IDEA cannot provide relief if no IDEA claim has

been made, such as when a student is not eligible for IDEA protection, there is no IDEA dispute (as was the case in the underlying action), or the student has a ADA/504 claim that is different from an IDEA claim.

In fact, there are more than 700,000 students[9] who are "504-only," meaning their school districts have determined that they fall under the protection of Section 504 and not IDEA. All of those students have a disability that at least potentially falls within the covered disabilities set out in 20 U.S.C. § 1401(A)(i) and, therefore, under the Sixth Circuit's overly broad reading of the exhaustion clause, would be required to exhaust IDEA administrative process as a prerequisite to filing their ADA/504 claim. That is contrary to § 1415*(l)*.

The distinction between coverage by Section 504 and IDEA lies in 20 U.S.C. § 1410(A)(ii)'s requirement that, by reason of the disability, the student "needs special education and related services." IDEA provides funding for "special education and related services to children with disabilities." 20 U.S.C. § 1411(a)(1). Thus, courts routinely hold that students who have disabilities under § 1401(A)(i) are not eligible for IDEA and special education because they simply do not need special education and related services. *See, e.g., Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.2d 378, 384 (5th Cir. 2007) (student with ADHD was not eligible for IDEA because he did not need special education); *Hood v. Encinitas Union Sch. Dist.*,

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9. As stated above: U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2011-12 http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 (last visited August 26, 2016).

486 F.3d 1099, 1109 (9th Cir. 2007) (student not eligible for IDEA; 504 plan was appropriate way to meet her needs). As the First Circuit recently stated, a child who needs only accommodations or services that are not part of special education to fulfill the objective of the need inquiry does not "need" special education. *Doe v. Cape Elizabeth*, 2016 WL 4151377, at *11.

A vivid illustration of how federal courts have used §1415(l) to avoid deciding ADA/504 claims is found in *S.D. v. Haddon Heights Bd. of Ed.*, No. 15-1804, 2016 WL 4394536 (3d Cir. Aug. 18, 2016).[10] In that case, S.D, whose medical impairments required frequent absences, was a student in the second academic year of a Section 504 plan. He had never been identified as eligible for IDEA by the school district that had prepared the Section 504 plans. The school district had the opportunity, and, in fact, the legal obligation, to determine whether the student was potentially eligible for IDEA at the time it made the initial determination that the student was entitled to a Section 504 plan. *See* 20 U.S.C. § 1412(3)("Child Find" obligation). Thus, by providing the Section 504 plan and not an IEP, the school district, not the parent, elected that Section 504 governed the student's claims.

Nonetheless the Third Circuit decision required him to exhaust his claims for discrimination and retaliation regarding his Section 504 plan under Section 504 and ADA "through the IDEA administrative process." 2016 WL 4394536, at * 6. The court explained that because the student's "alleged injuries are educational in nature and

10. Counsel for the appellants will be filing a petition for rehearing shortly.

implicate services within the purview of the IDEA, we conclude that Appellants' claims must be exhausted under the IDEA." *Id.* at *1. This decision both resuscitates and expands *Smith* to ADA. This approach was decisively rejected by Congress in adopting § 1415(*l*).

Given that the educational professionals had determined that a Section 504 plan was appropriate for S.D., and that Section 504 does not require exhaustion of administrative remedies, there was no basis in § 1415*(l)* to require the student to exhaust IDEA administrative proceedings that are inapplicable to students who are not eligible for IDEA. In fact, Section 504 has its own procedural safeguards, including different due process requirements, and exhaustion of those administrative remedies is not required prior to bringing a Section 504 suit. *See* 34 C.F.R. § 104.36 (2015). If Congress had intended to require 504-only students to exhaust administrative proceedings, it would have created Section 504 exhaustion requirements and provided for administrative proceedings, not those of a different law not applicable to their legal claims. Or it could have required that both statutes use the same administrative law proceedings. But it did not do so. Instead it acted to expand the ability of IDEA students to use other federal legal claims.

As this Court has observed, "it is for Congress, not this Court [or any court], to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Congress was clear that HCPA did not strip students of their rights under Section 504; it did not grant courts the ability to transform any claim by any public school student with a disability into an IDEA claim because the claim had something to do with education and the student had a disability of some kind.

C. The misinterpretation of §1415(*l*) is causing real harm to students with disabilities and their parents

The potential ways in which school districts can use Section 1415(*l*) to deny students with disabilities and their families' vindication of their rights is well established.

1. School districts have denied students with disabilities and their families access to court by using § 1415(*l*) even in entirely non-IDEA related damage claims for rape, assault, and wrongful death

Last year a Missouri student (with an intellectual disability) sued her school district when she was the victim of repeated sexual assault and rape on school grounds during the 2013-2014 school year. *See Moore v. Kansas City Pub. Sch.*, No. 15-2617, 2016 WL 3629086 (8th Cir. July 7, 2016). The student brought her action in state court; the school district removed it to federal court on April 20, 2015,[11] arguing that her claims were under IDEA because of her disability status and the location of her abuse, and **sought dismissal for failure to exhaust administrative remedies.** The district court agreed that some of D.S.'s injuries "could potentially be redressed under the IDEA," decided it had original jurisdiction and dismissed the claims for lack of exhaustion. *Id.* at *2. Even though the Eighth Circuit recognized the detour through federal court was contrary to HCPA and reversed, justice for D.S.

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11. Civil Docket, *Moore v. Kansas City Pub. Sch.*, No. 4:45-Cv-00293-DW, (June 26, 2015), *rev'd*, No. 15-2617, 2016 WL 3629086 (8th Cir. July 7, 2016).

has been delayed more than fifteen months because of the school district's manipulation of 20 U.S.C. § 1415(*l*) and the district court's erroneous application of that provision. That is not only inconsistent with the plain language of the HCPA but shockingly destructive of its intent.

Along these lines, school districts have also tried to argue exhaustion is required when the parents' claims relates to the student's death. In *Moore v. Chilton County Board of Education*, a family sued the school system after their child committed suicide after being horrifically bullied at school, and by his classmates. 936 F. Supp. 2d 1300, 1308 (M.D. Ala. 2013). The school system tried to have the family's claim dismissed for failure to exhaust, but the district court held that exhaustion did not apply to the family's claim that the student's suicide was caused by the school's failure to protect the student from bullying and disability harassment under Section 504 and ADA. *Id.* *See also Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 483, 490 (W.D. Pa. 2010) (exhaustion does not apply to claim student's death in school from asthma violated student's civil rights). Still, for damages claims, students and families not only have their damages award delayed but also have the amount reduced because they have to pay for significant amount of attorney time to defeat the school system's unsupportable effort to use §1415(*l*) to avoid liability.

These examples highlight the playing field the Sixth Circuit has created for families trying to vindicate their non-education related rights.

2. Students are harmed when courts misinterpret HCPA to require them to sacrifice early resolution of their IDEA claims for current services to maintain their right to pursue civil rights damages claims

Even when parties understand and agree that IDEA litigation is not in their best interests, courts still have found ways to deny rights vindication on §1415(*l*) grounds. For example, in *A.F. by Christine B. v. Espanola Pub. Sch.* 801 F.3d 1245, 1251 (10th Cir. 2015), the student was able to mediate her IDEA claim after filing IDEA due process complaint. She sought to press her damages claims for violations of civil rights laws after the settlement of her IDEA claim.

However, the school district still sought to delay or forestall any right to Section 504 and ADA remedy on exhaustion grounds even though it had elected to not obtain a release of ADA and Section 504 claims in the settlement agreement. Unfortunately for the student, the court of appeals dismissed the case. This was despite the settlement where the parties understood IDEA claims were already resolved, and despite the fact that the student's lawsuit sought damages – a remedy unavailable in an IDEA proceeding. In practice, this rule requires IDEA-eligible students in the Tenth Circuit to forego currently needed services (by way of mediation agreement, resolution session agreement, or other settlement mechanism) and instead pursue costly IDEA due process proceedings in order to vindicate their civil rights complaints. This clearly undermines the intent of the HCPA.

3. Misapplication of the HCPA harms public school students by depriving them of the rights and remedies that other individuals with disabilities who have a service dog enjoy

Students who are not subject to IDEA or who are not in an elementary or secondary school environments are able to vindicate their Section 504 and ADA rights in the manner intended by Congress. For example, in *Alejandro v. Palm Beach State College*, 843 F. Supp. 2d 1263, 1266 (S.D. Fla. 2011), a college student successfully vindicated her ADA right to access with a service dog in a little over a month.[12] In *Alboniga v. School Board of Broward County*, a case where the district court held that IDEA exhaustion was unnecessary because the ADA claim did not involve the school board's compliance with IDEA, the student was able to proceed directly to federal court on her ADA service animal claim and obtained a summary judgment decision in her favor in about eleven months.[13] 87 F. Supp. 3d 1319, 1329 (S.D. Fla. 2015). For other elementary and secondary public school students, however, the misapplication of §1415(*l*) causes unwarranted delays by requiring exhaustion of pointless due process hearings or responses to motions to dismiss for failing to exhaust.

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12. Ms. Alejandro, who was denied her right to bring her psychiatric service dog to college, filed her an ADA complaint in March 14th, 2011 in state court, the college removed it to federal court on March 29th, the federal judge set it down for a temporary injunction hearing, and by May 2, 2011, the college had filed a notice that it consented to provide the relief requested.

13. Docket Sheet, *Alboniga v. School Board of Broward County*, 87 F. Supp. 3d 1319, 1329 (S.D. Fla. 2015)

Requiring exhaustion of administrative remedies in service animal cases, where there is no IDEA claim available, is contrary to the HCPA. It creates a procedural hurdle that makes it more difficult for a public school student than for an older one attending college or even an adult going on a tour of a beer factory. *See, e.g., Johnson v. Gambrinus/Spoetz Brewery*, 116 F.3d 1052, 1064-65 (5th Cir. 1997)(holding that applying blanket no animal policy to guide dog violated ADA).

Here, the Sixth Circuit stated that Fry's IEP "could just as well have provided for her service animal," without identifying any legal claim that Fry could have used to require the school district to permit her to bring her service animal to school. *Fry* 788 F.3d at 629. This case does not involve a request for special education regarding the dog or a request that the service animal be considered a related service. The fact that the IEP could mention the service animal and any accommodations needed for the service animal in the statement of "supplementary aids and services,"[14] 20 U.S.C. § 1414(d)(1)(A)(i)(IV), does not suffice to show that the parents had a viable legal claim to require the school to permit the service animal to accompany their daughter. In contrast to IDEA and its regulations that say nothing at all about service animals, ADA Title II regulations define service animals and require public entities to allow access for service animals, providing a crystal clear legal claim. *See* 28 C.F.R. §§ 35.104 & 35.136.

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14. The term supplementary aids and services is defined as "aids, services, and other supports that are provided to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . .." 20 U.S.C. § 1401(33).

4. Requiring parents to participate in extensive litigation that they know will never be compensable under IDEA or ADA/504 as a prerequisite for a distinct ADA/504 claim is contrary to the language of HCPA as well as its purpose

The wasteful nature of the administrative hearings over nonexistent IDEA claims does not merely effect parents and children who bring those claims it also has an impact on other parents and children who need legal assistance and depend on the few legal services, protection and advocacy agencies, law school clinics, and other public interest law firms available to help them.

Most families of children receiving special education services have limited resources, both independently and because of the strain raising a child with a disability can have on a family's finances. One-quarter of students on IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[15] Congress understood that, absent a fee-shifting framework as part of the IDEA's due process procedures, many families would be unable to access counsel to undertake special education cases, and, without counsel, would face the nearly insurmountable to resolve their IDEA disputes.[16] Senator Weicker explained

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15. Elisa Hyman, *et al.*, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 112-13 (2011).

16. Recent studies have confirmed that without counsel, parents left on their own are without the experience or ability

that, without access to attorneys' fees, "the economic resources of parents become crucial to the protection of their children's rights regardless of the merits of the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984). Senators specifically cited the example of Mary Tatro, who testified at a Senate hearing. She spoke about her family's experience in litigating *Tatro*, 468 U.S. 883. Her case was a "clear example of [a] school district extending judicial proceedings for more than 5 years in an attempt to force the Tatro family to drop their case due to the exorbitant cost of attorneys' fees." S. Rep. No. 99-112, 99th Cong., 1st Sess. at 17-18 (1985). *See also* Senate HCPA Hearing, at 24-25.[17] Here, the exorbitant cost of pointless administrative hearings that only delay a decision on the merits of ADA/504 claims will deter both parents and attorneys from pursuing meritorious cases.

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to "navigat[e] the intricacies of disability definitions, evaluations processes, the developments of IEPs, the complex procedural safeguards, among other provisions in the statute," and as a result, parents of students who were represented by counsel were far more likely to be successful in their IDEA claims. Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016). For example, the data from twelve years of North Carolina IDEA due process hearings showed that *Pro se* parents only prevailed on at least one issue in only 11.1% of the cases, and in full in only once, for 2.2% of the cases, and that was with the help of a non-attorney advocate. *Id.* In contrast, when represented by counsel, parents prevailed on at least one issue more than half the time (51.3%) and prevailed on the entire claim nearly one third of the time (30.8%). *Id.*

17. It was only because a public interest group was able to provide legal assistance after the family's funds ran out that they were able to pursue the appeal to the successful conclusion of a unanimous Supreme Court decision in their favor. Similarly, E.F. and her parents were fortunate that they were able to secure pro bono counsel.

In response to *Smith*, which held that fees were unavailable and reversed an award of fees to prevailing parents, Congress added a statutory fee provision, now codified at 20 U.S.C. § 1415(i)(3). As with other civil rights attorneys' fees, under IDEA, parents are only entitled to attorneys' fees if they prevail. *Id.* If the IDEA claim is meritless, parents not only waste precious time but also risk losing the financial resources devoted to litigating the hearing. Attorneys will be deterred from taking cases that require both protracted delays and noncompensable legal services.

Such an effect can be seen in the case of *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 78 F. Supp. 3d 1289, 1297 (C.D. Cal. 2015) involving fee litigation following victory in the Ninth Circuit. In that case, K.M. ultimately wanted to bring an ADA "effective communication" claim, and elected to exhaust an IDEA claim because the remedy sought could, in theory, include compensatory education in the form of the appropriate communication device and the denial of the appropriate communication system could be deemed a denial of FAPE under the IDEA. The student lost her claim for FAPE under the IDEA but prevailed in both the district court and Ninth Circuit that ultimately found in favor of K.M. on the grounds that ADA and Section 504's effective communication regulations imposed a higher standard than IDEA FAPE requirement. *See K.M.*, 725 F.3d at 1098. Even though the student in that case exhausted IDEA claims knowing that the relief sought was truly and more appropriately available under an ADA/504 claim, the student was penalized for doing so when she sought an award of attorneys' fees on her litigation. Though she had been required to exhaust so as to be able to bring her ADA/504 claims, the court held

that the parents were entitled to be paid for only 50% of the work done on the IDEA due process hearing.[18] *K.M.*, 78 F. Supp. 3d at 1297.

This conundrum is certainly not one that should be imposed onto cases where there are no overlapping issues that require the educational expertise presumed of administrative hearing officers. For example, while in *Hoeft v. Tucson Unified School District* the Ninth Circuit held that "[e]xhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual records, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their programs for disabled children," 967 F.2d 1298, 1303 (9th Cir. 1992), such expertise is not required when dealing with non-educationally related claims of discrimination and retaliation. *Cf. K.M.*, 725 F.3d at 1101 (compliance with the IDEA has no impact on whether there was a violation under Section 504's (or the ADA's) antidiscrimination and anti-retaliation mandates). If ADA/504 claims have overlapping legal elements and meaningful relief (such as a denial of FAPE claim, *see* 34 C.F.R. § 104.33(b)(2)) is available, due process proceedings may serve these purposes. But when ADA/504 claims are distinct anti-discrimination claims, not claims

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18. Requiring parents' lawyers to undertake extensive work that they know will never be compensable under IDEA or ADA/504 as a prerequisite for a distinct ADA/Section 504 claim is contrary to the language of HCPA as well as its purpose. Congress was so concerned about the financial burden for parents and their counsel that it made the HCPA retroactive. P.L. 99-372, 100 Stat. 797 (Aug. 5, 1986).

regarding the sufficiency of an educational program, the administrative proceedings do not serve these purposes. The right to a service animal under ADA is not based on the student's educational needs under IDEA; the pertinent federal regulation makes no mention of education and, applies to all public entities. 28 C.F.R. § 35.136 (2015).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ALEXIS CASILLAS
ALICE K. NELSON
CATHERINE MERINO REISMAN
ELLEN SAIDEMAN
COUNCIL OF PARENT
ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285
(844) 426-7224

SELENE ALMAZAN-ALTOBELLI
Counsel of Record
COUNCIL OF PARENT
ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285
(844) 426-7224
selene@copaa.org

Counsel for Amici Curiae

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IN THE
Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR,
BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS,
JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT,
AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF PROFESSOR THOMAS HEHIR, PROFESSOR MELODY B. MUSGROVE, AND MADELEINE WILL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

IRA A. BURNIM
LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

August 29, 2016

AARON M. PANNER
Counsel of Record
JOSHUA HAFENBRACK
FREDERICK GASTON HALL
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy. *Amicus* Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the Office of Special Education Programs under President William J. Clinton and has extensive experience implementing school district-level special education plans with the Chicago and Boston public school systems.

Amicus Dr. Melody B. Musgrove is Co-Director of the Graduate Center for the Study of Early Learning and Associate Professor of Special Education at the University of Mississippi. Dr. Musgrove served as the Director of the Office of Special Education Programs under President Barack Obama and previously served as a classroom teacher, school administrator, district special education director, assistant superintendent, and State Director of Special Education for the Mississippi Department of Education.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than thirty-five years of experience advocating for individuals with intellectual disabilities and their families and developing

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the decision of the court of appeals is contrary to the express terms of the statute and ignores the basic difference between the Individuals with Disabilities Education Act ("IDEA") — which creates an entitlement to a free appropriate public education and relies on elaborate and sometimes expensive administrative procedures for enforcement, with special education services or placement as remedies for students and parents — and § 504 of the Rehabilitation Act of 1973 and the Americans

with Disabilities Act of 1990 ("ADA") — which enact prohibitions on discrimination that may require different remedies.

SUMMARY OF ARGUMENT

I. The ADA and the Rehabilitation Act are broad anti-discrimination statutes that serve distinct goals and provide distinct remedies from those provided under the IDEA. The former are broad statutes that prohibit discrimination against individuals with disabilities, requiring reasonable accommodations to avoid such discrimination. The IDEA, by contrast, is designed to ensure that children with disabilities are provided the specialized instruction or related services needed to ensure a free appropriate public education. Many students with disabilities may require reasonable accommodations to avoid discrimination, without any need for the special education services that the IDEA requires. Indeed, the IDEA's predecessor statute was adopted against the backdrop of existing anti-discrimination law. And, after this Court's ruling in *Smith v. Robinson*, 468 U.S. 992 (1984), that the IDEA's predecessor statute was the exclusive means of seeking relief for claims involving rights of students with disabilities, Congress enacted 20 U.S.C. § 1415(*l*), which makes clear that the rights guaranteed by federal anti-discrimination laws are distinct and are separately enforceable from the IDEA.

The Sixth Circuit's contrary view ignores the plain language of the statute and leads to paradoxical results. Alleged discrimination against a student with a disability may not implicate whether the student receives a free appropriate public education. And remedies available to redress such discrimination may not be available under the IDEA. In such circumstances, it makes no sense to require exhaustion of

administrative remedies that are inapposite to the alleged discrimination. And such a requirement imposes an unfair burden on students receiving special education services under the IDEA, because a similarly situated student with a disability subject to identical discriminatory conduct and seeking the same remedy would not be subject to any such exhaustion requirement.

II. Based on their long experience working in the field of special education, *amici* see no risk that reading the statute according to its terms will risk any "flood" of litigation over alleged discrimination. Parents of students who require special education services are primarily concerned that their children receive those services, and they are typically aware that to achieve that end they must participate in the development of an Individualized Education Program ("IEP") and pursue administrative remedies in cases of disagreement. Plaintiffs in this case did not attempt to bypass that mechanism.

Furthermore, parents of children with disabilities — whether or not they are eligible for special education services — have available an alternative informal dispute resolution mechanism in cases of alleged discrimination. The Office of Civil Rights in the Department of Education ("OCR") has a four-decade history of enforcing the non-discrimination rights of students with disabilities. Parents can pursue complaints about discrimination with OCR without a lawyer; complaints are frequently resolved though informal negotiation and without litigation.

While *amici* believe that court litigation to address discrimination in schools will be relatively rare, they nevertheless agree with petitioners that preserving the distinct remedial schemes of distinct federal statutes will best serve the interests of students and educators.

ARGUMENT

I. THE ADA AND THE REHABILITATION ACT SERVE DIFFERENT GOALS AND PROVIDE DIFFERENT REMEDIES FROM THE IDEA

The ADA and the Rehabilitation Act, on the one hand, and the IDEA, on the other, are independent, distinct statutes that focus on different wrongs and provide different remedies. By imposing an exhaustion requirement that not only is non-statutory but also is in conflict with the express terms of the IDEA, the Sixth Circuit erred.

A. The ADA and the Rehabilitation Act Provide a Comprehensive Anti-Discrimination Mandate for Public Services and Entities

The ADA and the Rehabilitation Act are broad statutes that prohibit discrimination against people with disabilities. They impose an obligation on public entities and entities receiving federal financial assistance to avoid discrimination against all adults and children with disabilities, both within and outside the school context. The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and Title II of the ADA prohibits any state or local government entity, including but not limited to public schools, from discriminating against a "qualified individual with a disability," *id.* § 12132. Similarly, § 504 of the Rehabilitation Act — enacted in 1973 — bars entities "receiving Federal financial assistance" (whether or not that entity is a public school) from discriminating against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a); *see School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987) (noting that the "basic purpose of § 504" is to ensure

that individuals with disabilities "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others").

To effectuate their remedial non-discrimination policies, the ADA and the Rehabilitation Act establish a "reasonable modification" standard, meaning public entities must make "reasonable modifications to rules, policies, or practices" to accommodate persons with disabilities. 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7) (requiring that, under the ADA, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

To show discrimination under Title II of the ADA and § 504, plaintiffs, including public school students and their parents, are *not* required to allege or prove that they were denied a free appropriate public education.[2] Rather, plaintiffs must show that (1) they have a qualified disability and (2) they were "excluded from participation in or [were] denied the benefits of the services, programs, or activities of a public entity, or [were] subjected to discrimination by any such entity" (3) "by reason of" their disability. 42 U.S.C. § 12132.

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[2] As petitioners explain, although the failure to provide a free appropriate public education may violate § 504 and the U.S. Department of Education's regulations implementing that statute, a school may violate general non-discrimination prohibitions even when it has met the IDEA's requirements. *See* Pet. Br. 8.

B. The IDEA Imposes Distinct Obligations on School Districts To Provide Special Services to Qualifying Students

The IDEA, which was originally enacted in 1975 as the Education for All Handicapped Children Act ("EHA"), ensures "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Any State that accepts certain federal educational funding assistance must comply with its terms. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). To be eligible for services under the IDEA, a student must (1) have a disability covered by the Act and (2) require specialized instruction and related services. *See* 20 U.S.C. § 1401(3). Because of this second criterion, some students with disabilities are not covered by the IDEA because they do not require specialized instruction.

Providing a qualified student with a disability with a free appropriate public education requires creating and following an Individualized Education Program ("IEP"). *See id.* § 1401(9)(D). A student's IEP must provide the student with a free appropriate public education that "meet[s] their unique needs and prepare[s] them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A).[3] A team

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[3] The U.S. Department of Education recently issued guidance stating that "IEP goals must be aligned with grade-level content standards for all children with disabilities," because this will help ensure "that an IEP for a child with a disability includes instruction and supports that will prepare the child for success in college and careers." Letter from Michael Yudin, Ass't Secretary, U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs. & Melody Musgrove, Dir., U.S. Dep't of

that includes the student's parents, a regular education teacher, and a special education teacher develop the IEP for that student before the beginning of every school year. *See id.* §§ 1412(a)(4), 1414(d). The IEP describes the student's present academic and functional performance, measurable annual goals, and the educational services that will advance the student toward those goals. *See id.* § 1414(d)(1)(A).

The IDEA therefore is a grant of rights that — in requiring special education services for students with disabilities — is different from the anti-discrimination and reasonable accommodation requirements of § 504 of the Rehabilitation Act and the ADA. The predecessor to the IDEA, the EHA, was enacted after § 504 and against the backdrop of its prohibition on discrimination. In enacting the EHA, Congress thus would have assumed the existence of non-discrimination duties and remedies for their enforcement.

Indeed, after this Court held in *Smith v. Robinson*, 468 U.S. 992 (1984), that the EHA was the exclusive means of seeking relief for claims involving rights of students with disabilities, Congress enacted 20 U.S.C. § 1415(*l*) to clarify that the rights guaranteed by the EHA (now the IDEA) and other federal laws protecting such students are distinct and are separately enforceable. That section expressly states that nothing in the IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of

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Educ., Office of Special Educ. Programs at 1, 3 (Nov. 16, 2015), *available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

children with disabilities." 20 U.S.C. § 1415(*l*) (citations omitted). To be sure, parents "seeking relief that is . . available under" the IDEA — that is, parents presenting complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education," or placement of the student in an interim alternative educational setting — must exhaust administrative remedies with the State before filing a lawsuit. *Id.* § 1415(b)(6), (f), (g), (k), (*l*). But parents are not otherwise required to exhaust administrative remedies before vindicating their student's rights under § 504 and the ADA to be free of discrimination — the statutory emphasis on otherwise available "rights, *procedures, and remedies*" makes that clear. *Id.* § 1415(*l*) (emphasis added).

C. The IDEA, and Its Requirement of a Free Appropriate Public Education, Is Not the Sole Legal Protection Afforded to Students with Disabilities

Students with disabilities are entitled to a school environment that is free from discrimination — whether or not they need specialized instruction or related services under the IDEA.

The IDEA, as the Ninth Circuit's *Payne* decision recognized, "is not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist *independent* of the IDEA and entitles a plaintiff to relief *different* from what is available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir.) (en banc), *cert. denied*, 135 S. Ct. 403 (2014); *see also Moore v. Kansas City Pub. Schs.*, ___ F.3d ___, 2016

WL 3629086, at *4 (8th Cir. July 7, 2016) (agreeing with *Payne*). The "IDEA and Title II [of the ADA] differ in both ends and means," and, while the IDEA set the "floor of access to education," Title II and its implementing regulations "require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with . . . disabilities." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013); *see also Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198, 201 (1982) (noting that the IDEA's requirement to provide special education services does not equate to providing "equality of opportunity or services").

The ADA and the Rehabilitation Act thus provide protections that often will not implicate the rights granted under the IDEA. To provide just one example, if a school district bars a student with a disability from participating in field trips or extracurricular activities — even though reasonable accommodations are available — that school district has discriminated against that student in violation of § 504 and the ADA. And that is true even if it has done nothing to implicate the student's IEP or academic curriculum.[4]

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[4] The U.S. Department of Education's Office of Civil Rights ("OCR") has issued administrative decisions *under § 504 of the Rehabilitation Act* concerning the circumstances under which a school district must accommodate students with disabilities so that they can participate in field trips and extracurricular activities. *See, e.g., Williamstown (MA) Pub. Schs.*, 39 IDELR 43 (OCR 2003) (school district required under § 504 to provide properly trained aide to accompany student with cerebral palsy on field trip); *Quaker Valley (PA) Sch. Dist.*, 39 IDELR 235 (OCR 1986) (school district required under § 504 to accommodate student with neuro-degenerative disorder who wanted to join swim team).

In this same vein, the Fry family had an interest in preventing discrimination regarding the use of their child's service dog irrespective of whether the school's actions violated the IDEA. As Judge Daughtrey pointed out in her dissent below, the barrier to E.F. using her service dog at school was not her IEP; the issue, rather, was the school district's policy to permit only "guide dogs," not "service dogs," on school grounds. Pet. App. 23 (Daughtrey, J., dissenting); *see also id.* at 27 (noting that the Frys' "request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs*").

As alleged in the complaint, the school district violated federal anti-discrimination law by refusing to modify its service animal policy to accommodate E.F. *See id.* at 33-34 ("'Th[e] evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a year, would result in a more prolonged and complete separation that would likely cause the Student's working relationship with the service animal to deteriorate.'") (quoting letter from the Director of OCR) (alteration in original). Through the ADA and § 504 of the Rehabilitation Act, Congress provided a private right of action and a damages remedy for that alleged violation.

D. The Court of Appeals' Decision Imposes Unfair Burdens on Students with Disabilities Receiving Special Education Services

The Sixth Circuit's decision inappropriately imposes an obligation on E.F. that a similarly situated student who was not eligible for special education services under the IDEA would not face. If E.F. were not an eligible student under the IDEA — and therefore had no need for an IEP — respondents could

not reasonably dispute that the Fry family could challenge the school's exclusion of her service dog under the ADA and the Rehabilitation Act, without exhausting the IDEA's administrative procedures.

As the Ninth Circuit stated in *Payne*, "[w]e do not think that the IDEA's exhaustion requirement was intended to penalize disabled students for their disability. This is not what § 1415(*l*) says, and we think it is not what Congress intended." 653 F.3d at 881. By preserving all rights and remedies under federal anti-discrimination law *except* in those circumstances where a party seeks "relief that is . . . available" under the IDEA, the statute makes clear that a student with a disability who requires specialized instruction maintains an equal right to challenge unlawful discrimination that cannot be addressed through the remedies available under IDEA.

II. AFFIRMING THE PLAIN LANGUAGE OF THE IDEA'S SAVINGS PROVISION WILL PROMOTE, NOT DISCOURAGE, EFFICIENT RESOLUTION OF DISPUTES

A. Parents of Children with Disabilities Seeking Education Services for Their Children Under the IDEA Have No Incentive To Bypass Administrative Procedures

In *amici*'s long experience working in the field of special education, they have found that parents of children with disabilities who need special education services are first and foremost concerned that their children receive services that will effectively address their children's needs. When parents are able to secure those services, they have no reason to seek further relief in court.

Parents are also aware that the only way to receive desired special education services — and secure a better education for their child — is to participate in the creation of their child's IEP and, should they disagree with the results, in the IDEA's administrative process. *See* 20 U.S.C. §§ 1414(d)(3)(A)(ii) (stating that school officials must consider a parent's request for particular educational programs or services in creating a student's IEP), 1415(f)-(i) (outlining the administrative remedies parents must exhaust before filing a lawsuit). In the vast majority of cases involving the denial of an academic or supportive service for a student with a disability, parents will not attempt to launch litigation; they will participate in and exhaust the IDEA's administrative remedies in hopes of obtaining that service for their child.

Only when a parent is not seeking a remedy available under the IDEA does the parent have an incentive to turn to other potential remedies. That is what occurred here: When the school district denied E.F. the use of her service animal, her parents participated in a "specially convened IEP meeting" and subsequently worked with the school to implement "a trial period, to last until the end of the school year, during which E.F. could bring [the service animal] to school." Pet. App. 3-4. When the school district told the Frys that the service animal would not be allowed to attend school with E.F the following year, the Frys removed E.F. from school but continued to seek relief through administrative channels, by filing an administrative complaint with OCR. *See id.* at 4. It was only when the Frys decided to enroll E.F. in a school that welcomed the service animal — at which point administrative relief from E.F.'s old school

would have served no purpose — that they filed this lawsuit. *See id.*

The Frys did not attempt to bypass informal resolution of the dispute. Rather, they collaborated with the school district in hopes of ensuring that E.F.'s service animal could attend school with her. When that collaboration failed, they still did not immediately sue, but rather availed themselves of an administrative process to get the educational benefit they desired. But when E.F. received all that she wanted — and needed — in her new school district, there was no longer any reason for her parents to continue the informal and administrative processes with the school district. The only thing remaining for her parents to do was to seek compensation for the discrimination E.F suffered.

B. The Office of Civil Rights Offers an Informal Mechanism To Resolve Claims of Discrimination Between Parents and Schools

Even when the administrative mechanisms of the IDEA are inapplicable, parents tend to forgo litigation in cases of discrimination in school and instead to pursue an informal remedy though the U.S. Department of Education's Office of Civil Rights ("OCR"). This informal remedy is available to parents through the simple act of filing a complaint with OCR, which enforces the ADA and § 504. *See* U.S. Dep't of Educ., *About OCR*, http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last modified Oct. 15, 2015).

OCR has a 40-plus-year history of intervening as an effective and efficient enforcer of the non-discrimination rights of students with disabilities. *See* Catherine D. Anderle, *Helping Schools Make the*

Grade, Mich. B.J., Feb. 2001, at 52, 53 (OCR senior attorney describing complaint process and stating that "OCR's goal is to resolve complaints as soon as possible," most often through negotiated and amicable agreements).

When parents contact OCR with complaints of discrimination against their children, they do not need a lawyer. OCR operates as a "neutral fact-finder," U.S. Dep't of Educ., *How the Office for Civil Rights Handles Complaints*, http://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last modified July 20, 2016), and often contacts school administrators directly to negotiate a solution informally and without litigation.

In *amici*'s experience, the OCR complaint process is typically much more efficient than either the IDEA's administrative due process protocols or resorting to litigation. Like litigation, administrative due process hearings often entail representation by counsel, resort to experts, and elaborate submissions. The OCR complaint process requires none of that. In most cases that come to OCR, the issue can be quickly and informally resolved, saving resources for schools and parents alike. It is not surprising that the complaint process is popular among parents, including as an alternative to litigation.

Children have the right to attend school in an environment that is free from discrimination. For most parents, the OCR complaint process is the fastest, most efficient, and most attractive way to achieve that goal, after direct engagement with the school system has failed.

C. Parents Rarely Go to Court, and a Ruling for Petitioners Will Not Change That

In the experience of *amici*, the rare cases in which parents do go to court involve discrimination that persisted despite repeated efforts to resolve concerns through less formal means. There is no reason to think that such cases will be frequent. And it is clear that — as the plain wording of § 1415(*l*) reflects — Congress intended to preserve a remedy in such cases.

Amici have been on both sides of disputes over access to special education services as well as disputes over discrimination by schools that do not implicate the remedies provided under the IDEA. The interests of students and of educators are best served — and the rights of students under federal law best respected — when the distinct remedial schemes of distinct federal statutes retain their separate and important roles.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

IRA A. BURNIM
LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

AARON M. PANNER
Counsel of Record
JOSHUA HAFENBRACK
FREDERICK GASTON HALL
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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Supreme Court of the United States

STACY FRY AND BRENT FRY, AS NEXT FRIENDS OF MINOR, E.F.,
PETITIONERS,

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF ILLINOIS AND MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
MEGHAN P. CARTER
Assistant Attorney General
* Counsel of Record

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
dfranklin@atg.state.il.us

[additional counsel listed on signature page]

QUESTION PRESENTED

Whether petitioners' civil action seeking money damages for past violations of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 constitutes a "civil action . . . seeking relief that is also available under [the Individuals with Disabilities Education Act (IDEA)]" for purposes of the IDEA's exhaustion requirement, 20 U.S.C. § 1415(*l*).

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I

INTEREST OF THE *AMICI CURIAE*

Illinois and Minnesota submit this brief in support of Petitioners to urge reversal of the judgment of the United States Court of Appeals for the Sixth Circuit in *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015). The court held that the IDEA's exhaustion provision, 20 U.S.C. § 1415(*l*), required Petitioners to exhaust their ADA and Rehabilitation Act claims alleging that Respondents violated their daughter's rights by not allowing her to be accompanied by her service dog in school.

The *Amici* States recognize the vital role that the IDEA plays in ensuring that students with disabilities receive their constitutional right to a free appropriate public education. The IDEA properly relies on the expertise of state and local educators and administrators in determining and implementing the best, individualized plan for educating each qualified student under the IDEA. In that way, the IDEA's exhaustion provision serves to guarantee that local education experts play an essential part in educating students with disabilities.

But the *Amici* States also recognize that § 1415(*l*) should not be read so broadly as to undermine the purpose and effectiveness of other statutes such as the ADA or the Rehabilitation Act. The rights afforded by and protected under these different statutory regimes are sometimes overlapping, and § 1415(*l*) should be construed in a limited manner so as not to interfere

with the efficient operation of the other laws. Therefore, the *Amici* States believe that exhaustion should not be required where the specific relief sought by civil rights plaintiffs is not available under the IDEA. Nor should exhaustion be required where the plaintiffs challenge a general pattern or policy of discrimination, as opposed to conduct that affects only the education of a particular student. Finally, exhaustion should not be required where the rights the plaintiffs seek to enforce are not related to the IDEA's core function of creating an education plan or where the expertise of school administrators that is a hallmark of the IDEA process is not required.

The *Amici* States also recognize the profound importance of service animals to students with disabilities. Students' service animals accompany them at all times, not just at school. Students for whom service animals are suitable should not face added obstacles in bringing their animals to school, as those obstacles harm the students and their families in ways that extend beyond the child's education. And accommodating a service animal does not require expertise in crafting individualized education plans. Accordingly, the *Amici* States submit that issues regarding the access provided to students with service dogs are best addressed under the ADA, not the IDEA.

SUMMARY OF ARGUMENT

Petitioners were not required to proceed though the IDEA's complex administrative process before they could bring their claims for damages under the ADA and Rehabilitation Act. The plain language of § 1415(*l*) shows a general intent not to restrict the rights and remedies available under those other civil rights statutes. Consistent with that intent, § 1415(*l*) contains a narrow exhaustion requirement that applies only in cases where the relief sought would be available under IDEA. Where, as with the claims for damages here, the relief requested could not be obtained in an IDEA proceeding, exhaustion is not required.

Nor should exhaustion be required when plaintiffs challenge a generally applicable policy of discrimination under the ADA and Rehabilitation Act. The IDEA administrative process is designed to formulate and revise a student's IEP. This focus on the educational needs of a particular student sets the IDEA apart from other civil rights statutes that are designed to eliminate discriminatory practices and provide systemic remedies where needed.

Exhaustion also should not be required when the complaint seeks to vindicate rights that are unrelated to the core IDEA purpose of creating an IEP for students with disabilities, or where the expertise of school administrators, which is a hallmark of the IDEA process, is not required. Requests to accommodate a

service dog in a school, in particular, is better handled under the ADA than through the IEP process.

ARGUMENT

I. The IDEA's Exhaustion Requirement Does Not Apply To Petitioners' Claims.

The IDEA serves a vital role by creating a process for crafting education plans for qualified students with disabilities. It effectuates this aim by enacting a comprehensive administrative procedure for education experts and parents to work together to create an individualized educational program (IEP) for each eligible student. But, as the IDEA itself recognizes, Congress did not intend for that statute to "restrict or limit the rights, procedures, and remedies" available under other statutes, including the ADA and the Rehabilitation Act. 20 U.S.C. § 1415(*l*). Congress sought to harmonize the IDEA with these broad remedial statutes by providing that a party must exhaust the IDEA's administrative procedures before filing a civil action under those other laws only if that action "seek[s] relief that is also available under this subchapter." *Id.* This exception should be read as a narrow one and does not encompass petitioners' claims for damages in this case.

A. Where the complaint requests relief that may not be afforded through the IDEA's administrative process, exhaustion is not required.

As § 1415(*l*)'s plain language states, the exhaustion requirement applies only in cases where a plaintiff seeks "relief" that is also "available" under

Subchapter 2 of the IDEA. Thus, the statute's primary focus is on the relief that plaintiff seeks. The best way to determine what relief is sought in a case is to analyze the complaint and ascertain the remedies the plaintiff requests. *See* Fed. R. Civ. P. 8(a)(3) (complaint must contain "a demand for the relief sought, which may include relief in the alternative or different types of relief"). Logically, a plaintiff who does not request a certain remedy does not seek that relief within the meaning of § 1415(*l*).

The question then becomes whether the relief sought is available under the Subchapter. To answer that question, the Court should consider the structure and purpose of the IDEA. The goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE). 20 U.S.C. § 1400(d)(1)(C). The FAPE guaranteed to students is one that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.*; *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (explaining Congress enacted the IDEA to guarantee a FAPE to all children with disabilities).

This Court has explained that the "*modus operandi* of the Act is the . . . 'individualized educational program [IEP].'" *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Ed. of the Commonwealth of Mass.*, 471 U.S. 359, 368 (1985). An IEP is "a comprehensive statement of the educational needs of a [child with a disability] and the specially designed instruction and related services to be employed to meet those needs."

Id.; *see* 20 U.S.C. § 1414(d)(A)(i). The IEP is formulated by the student's IEP Team, which is composed of the child's parents, teachers, a qualified representative of the local educational agency, other individuals with expertise, and, where appropriate, the child. 20 U.S.C. § 1414(d)(B). The IEP process requires a number of steps: the child is identified as possibly needing special education and related services; the child is evaluated by a state or local educational agency; eligibility is determined; the IEP meeting is held; the IEP is written; services are provided under the IEP; the student's progress is measured and reported to the parents; the IEP is reviewed and if necessary revised by the IEP Team at least once a year; and the child is reevaluated at least once every three years. 20 U.S.C. §§ 1412(a), 1414.

A child's parents may file an administrative complaint with the local or state educational agency "relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6). That complaint becomes the subject of "an impartial due process hearing" before the state or local educational agency, as determined by state law. 20 U.S.C. § 1415(f)(1)(A). In additional to ensuring procedural compliance, the hearing officer is to determine whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E). If the decision was rendered by the local educational agency, any party aggrieved by the findings and decision may appeal to the state educational agency. 20 U.S.C. § 1415(g)(1).

Any party aggrieved by the findings or decision of the state agency may bring a civil action in state or federal court. 20 U.S.C. § 1415(i)(2)(A). The court hearing such action shall "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). In *Burlington*, this Court explained that the "ordinary meaning of these words confers broad discretion on the court" reviewing the matter. 471 U.S. at 369. Within this broad discretion, the type of relief that may be awarded "is to be 'appropriate' in light of the purpose of the Act." *Id.* In other words, appropriate relief is that which is necessary to provide a FAPE. *Id.* at 369-70.

This available relief focuses on ensuring that the education is both appropriate and free. For instance, in *Burlington*, this Court held that a court could in certain circumstances order a school district to reimburse parents for the cost of private special education for a child. The Court reasoned that the purpose of the statute is to provide a *free* appropriate public education, so retroactive reimbursement to parents may be a proper remedy. *Id.* at 370; *see also Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 13 (1993) ("Moreover, IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free.").

In determining the appropriate relief under this section, "equitable considerations are relevant in fashioning relief," and the court must consider "all relevant factors," including "the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 16 (internal quotation

marks omitted). This Court expressly distinguished the permissible retroactive reimbursement from "damages." *Burlington*, 471 U.S. at 370-71 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."). Damages for statutory violations are not appropriate relief under the IDEA because they are not relevant to the purpose of the statute, which is to provide a FAPE, not compensate for injuries. *See Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982) (focus of IDEA is on "*procedures* which would result in individualized consideration of and instruction for each child") (emphasis in original).

The scope of monetary relief available under the IDEA should not be given a liberal interpretation. The IDEA is Spending Clause legislation, so any conditions attached to a State's acceptance of funds must be stated unambiguously. *See Forest Grove*, 557 U.S. at 246 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Therefore, for relief to be authorized under the IDEA, the statute must put States on notice that they will be subject to the monetary awards in question. *Id.* (citing *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 304 (2006)). States are on notice that they must provide a FAPE, but they are not on notice that they are subject to other relief such as damages claims. *See id.*

In sum, § 1415(*l*) requires analysis of what relief is actually sought and whether that particular relief is available under the IDEA process. Because damages are

not appropriate relief, they are not available under the IDEA and exhaustion is not required.

B. Claims challenging discriminatory policies are not subject to the exhaustion requirement.

Examination of the complaint to determine whether the type of relief sought could be granted under Subchapter 2 of the IDEA is sufficient to resolve the question presented by the instant case. But in certain cases examination of the relief sought in the complaint will not be sufficient by itself to determine the scope of § 1415(*l*)'s exhaustion requirement.

The IEP, as its name suggests, is focused on the provision of a FAPE to a particular student through an *individualized* program tailored to that student. *See* 20 U.S.C. § 1414(d). Accordingly, the relief to be obtained under the statute is specific to the individual student. *See* 20 U.S.C. § 1415(i)(2)(C)(iii); *Burlington*, 471 U.S. at 369-70. By contrast, when a student raises a challenge to a generally applicable policy, such as a school district's policy regarding the use of service dogs (*see* Pet. App. A23), exhaustion is not necessary. Such claims do not relate primarily to any student's IEP, but rather challenge a broader discriminatory practice. Accordingly, the most appropriate remedy for such a general pattern or practice is the broad, systemic injunctive relief that is available under the ADA or the Rehabilitation Act. *See, e.g.*, *Thorpe v. Dist. of Columbia*, 303 F.R.D. 120 (D.D.C. 2014) (action by individuals with disabilities under ADA and Rehabilitation Act concerning policy of confinement to

nursing facilities); *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002) (class action by individuals with disabilities under ADA seeking injunctive relief against transit system). Exhaustion should not be required in these circumstances.

C. Exhaustion is not required where the claims raised seek to vindicate rights that are not predominantly based in the IDEA and do not call on the expertise of school administrators.

Certain types of relief sought in a complaint generally may be available under the IDEA, but in the context of a particular case, that relief may be unrelated to the core IDEA functions of creating an education plan and the claim may not implicate the special expertise of school administrators that lies at the heart of the IDEA's IEP process. Those claims should not fall within the exhaustion requirement. Consider, for example, a slight variation on the facts of this case where the plaintiffs seek an interlocutory and permanent injunction, alleging a violation of the ADA because a school failed to reasonably accommodate her child's disability by not permitting her to bring their service animal to school. The relief requested—an injunction requiring the school to permit the service animal—could be obtained under the IEP-review process in those circumstances where it is required for a FAPE. But requiring exhaustion would frustrate the purposes of the other statutes, contrary to Congress's clear intent.

As a starting point, the legislative history of the exhaustion provision shows that it should be read narrowly. In enacting § 1415(*l*), Congress legislatively overrode this Court's holding in *Smith v. Robinson*, 468 U.S. 992 (1982). In *Smith*, the plaintiffs claimed that the denial of a FAPE violated their constitutional rights to due process and equal protection. *Id.* at 1008-09. The Court noted that those claims were "virtually identical" to claims plaintiffs raised under the Education of the Handicapped Act (EHA), which was the precursor to the IDEA. *Id.* at 1009. The Court concluded that the EHA provided a "comprehensive scheme" to aid the States in complying with their constitutional obligation to provide public education to children with disabilities, and Congress intended children "with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Id.*

In response, Congress made clear that the IDEA is not the only avenue for challenging a school district's decision making. Section 1415(*l*) "reaffirm[s]" "the viability of section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985). Thus, § 1415(*l*) is not just an exhaustion provision, it is at the same time an "IDEA non-exclusivity provision." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013).

As courts have recognized, the IDEA and the ADA "differ in both ends and means." *Id.* The ADA is a broad remedial statute enacted to address centuries of

discrimination in all aspects of life faced by people with disabilities. *See* 42 U.S.C. § 12101(a). Congress specifically found that discrimination against individuals with disabilities persists in areas including public accommodations, education, and access to public services. 42 U.S.C. § 12101(a)(3). The purpose of the ADA is to "invoke the full sweep of congressional authority" to "address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

Title II of the ADA addresses discrimination in public services, including public schools, by prohibiting the exclusion of qualified individuals with disabilities from participation in and the benefits of services, programs, and activities of public entities. 42 U.S.C. § 12132; *see K.M.*, 725 F.3d at 1097 ("There is also no question that public schools are among the public entities governed by Title II."). Similarly, the Rehabilitation Act prohibits disability discrimination in programs receiving federal financial assistance. 29 U.S.C. § 794(a). In enacting this statute, "Congress enlisted all programs receiving federal funds in an effort 'to share with handicapped Americans the opportunities for *an education*, transportation, housing, health care, and jobs that other Americans take for granted.'" *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 277 (1987) (quoting 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey)) (emphasis added). These statutes therefore provide relief from discrimination and discriminatory practices in the public school setting.

To remedy such discrimination, Title II authorizes the same remedies as the Rehabilitation Act. *See* 42

U.S.C. § 12133 (incorporating 29 U.S.C. § 794a). Among other things, those statutes permit the entry of "an equitable or affirmative action remedy." 29 U.S.C. § 794a. Among other things, a plaintiff may seek an interlocutory injunction under Title II requiring a municipality to let him use his service dog in certain public places. *See Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026 (N.D. Iowa 2011). These statutes therefore allow immediate, emergency relief to prevent discrimination on the basis of a disability.

The legal focus of a claim under these statutes is different than that of a claim under the IDEA. To prove a violation of the ADA or Rehabilitation Act for failure to grant a reasonable accommodation, a student would need to demonstrate that she is a qualified individual with a disability, that the school or district receives federal assistance (for purposes of the Rehabilitation Act) and is administered by a public entity (for purposes of the ADA), and that the requested accommodation was reasonable, necessary to avoid discrimination on the basis of disability, and was denied. *See Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 751-52 (7th Cir. 2006); *see also* 28 C.F.R. § 35.130(b)(7) (defining public entity's obligation to make reasonable modifications to avoid discrimination on the basis of disability). The school's defenses would largely be restricted to an argument that the request for an accommodation posed an undue burden or required a fundamental alteration of the nature of the service, program, or activity. *See Alexander v. Choate*, 469 U.S. 287, 300 (1985) ("The obligation of an educational institution to make modifications in order to accommodate an individual with a disability does not

require the institution to make 'fundamental' or 'substantial' changes to its programs or standards."); 28 C.F.R. § 35.130(b)(7).

As opposed to these statutes, the IDEA is not a general anti-discrimination law, and "[a]t no point would the administrative process offer insight into the merits of a discrimination claim." *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1281 (10th Cir. 2007). Instead, the IDEA creates a comprehensive scheme for States and local school districts to provide a FAPE for children with disabilities, including detailed procedural guarantees regarding setting and modifying a student's IEP. *See* 20 U.S.C. §§ 1400, 1412(a)(4), 1415(b)(1).

Meanwhile, as this Court has acknowledged, the administrative IEP review process under the IDEA "is ponderous." *Burlington*, 471 U.S. at 370. Under the IDEA procedure, "administrative judicial review of a parent's complaint often takes years." *Forest Grove*, 557 U.S. at 238. A party seeking an injunction to enforce rights or to remedy discrimination that is prohibited by the ADA or Rehabilitation Act should not be expected to wait out the administrative process over the course of years. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) ("Administrative remedies need not be pursued in the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.") (internal quotation marks omitted).

In addition, the Sixth Circuit's reasoning would require a child who happens to be covered by the IDEA to exhaust her administrative remedies to bring her service dog to school, while a child with a disability who is not covered by that statute may bring an ADA claim directly in court for an emergency injunction to allow access for her service dog. The Rehabilitation Act and the ADA define "disability" as a substantial impairment that affects one or more major life activities (including learning), a record of such impairment, or being regarded as having such an impairment. 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102(2). The IDEA defines "child with a disability" differently, as a child "with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities" who, based on this, "needs special education and related services." 20 U.S.C. § 1401(3)(A)(i)-(ii). The differing scope of these definitions is by design. The ADA and Rehabilitation Act broadly cover people with disabilities to ensure full access and participation in all aspects of society, while the IDEA requires education and administrative rights for a subset of children whose disabilities adversely affect their educational performance or cause educational need.

Due to the IDEA's limited coverage and the ADA's and Rehabilitation Act's expansive coverage, many school-aged children are covered by the latter statutes but not the former. These include children with disabilities who do not have an IDEA-qualifying

disability or who do not need special education or related services by reason of their disability. 20 U.S.C. § 1401(3)(A). Children with disabilities who are not covered by the IDEA because they do not need special education may nonetheless require reasonable accommodations under the ADA and the Rehabilitation Act to attend regular classes. Such accommodations might include "respiratory therapy during the day," "home or hospital tutoring during infrequent crisis situations that necessitate[ ] absence from school," or "catheterization services." Ruth Colker, THE LAW OF DISABILITY DISCRIMINATION 232 (7th ed. 2009). As noted, the ADA and Rehabilitation Act also cover children with a history or record of a disability and children who are regarded as having a disability; the IDEA does not cover these children. *Id.*

But it makes little sense to permit a child who is entitled to an ADA accommodation to go straight to court to obtain immediate relief while another a child who is entitled to the same accommodation must navigate the IDEA's lengthy administrative process to change her IEP. That is especially true where the accommodation does not require the expertise of school administrators in crafting an IEP.

Therefore, where the rights allegedly violated have a basis in another statute, do not concern the core function of creating an education plan, and do not require the expertise of school administrators, exhaustion should not be required.

II. Issues Regarding Students' Use Of Service Animals In Schools Are Better Suited To Resolution Under The ADA Than Within The IDEA's Administrative Process.

Issues regarding access to public entities or accommodations for individuals with disabilities and their service animals fall squarely within the ADA's scope. Service animals support people with disabilities in all aspects of life, furthering the ADA's goals of independence and full community participation. *See* 42 U.S.C. § 12101(a)(7). A service animal is a dog that is specifically and individually trained to perform designated tasks or work directly related to an individual's disability. 28 C.F.R. § 35.104 (providing nonexhaustive list of tasks that may be performed by service animals). The benefits conferred by service animals, particularly when paired with children with disabilities, however, extend far beyond the completion of these tasks. Service animals promote a child's well-being because they can reduce anxiety, ease social interactions, build confidence, and enhance the quality of life for both the child and the child's family. *See* Diana H. Rintala et al., *Effects of Assistance Dogs on Persons with Mobility or Hearing Impairments: A Pilot Study*, 45 J. REHABILITATION RES. & DEV. 489, 490, 502; B.W. Davis et al., *Assistance Dog Placement in the Pediatric Population: Benefits, Risks, and Recommendations for Future Application*, 17 ANTHROZOÖS 130, 131 (2004).

The legislative history of the ADA recognizes that "[a] person with a disability and his or her [service] animal function as a unit and should never be involuntarily separated." 135 Cong. Rec. S10,800 (1989) (statement of Sen. Simon). To force such separation "[is] discriminatory under the [ADA]." *Id.* Courts have consistently recognized the importance of allowing service animals to accompany people with disabilities at all times—in school and out—to preserve the bond between them and maintain the dog's skills. *See, e.g.*, *Sullivan ex rel. Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 960 (E.D. Cal. 1990) (granting preliminary injunction requiring school to allow student to bring service dog to school because, "[b]y denying access to plaintiff's service dog, defendants have greatly diminished the dog's usefulness to plaintiff"); *Sak*, 832 F. Supp. 2d at 1045 (granting preliminary injunction to require a city to permit a person with disability to maintain a pit bull as a service animal where the plaintiff claimed "taking away his service dog inflicts injury on him comparable to taking away his wheelchair, which is also a necessity"); *Alboniga v. Sch. Bd. of Broward Cty. Fla.*, 87 F. Supp. 3d 1319, 1341 (S.D. Fla. 2015) ("there is no factual dispute that separating A.M. from his service animal during the school day would have a detrimental impact on the human-animal bond and would diminish the animal's responsiveness and effectiveness outside of the school setting").

While service animals provide significant benefits to students, they often present only modest administrative issues for schools, obviating the need for the IDEA process. The routine scheduling issues that may arise when granting such access to a service animal do not call upon school administrators' expertise. For that reason, they can be handled outside of the IDEA's administrative processes, as is the case for service-animal access in other places of public accommodation under the ADA.

School districts seeking to block service animal access have raised concerns including the health and safety of other students and teachers with allergies or phobias to service animals, anticipated difficulties with the management of the service animal, and fears that the dog will pose a distraction. *See, e.g.*, *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247–48 (2d Cir. 2008). But schools can address such concerns through conventional planning and interventions outside of the IEP process. For instance, they can arrange class schedules to minimize exposure of students and teachers with allergies and fears, just as a school may need to take certain steps to ensure a class schedule with accessible classrooms for a student who uses a wheelchair. If the student requires that the school assist with the service animal during the day, schools can plan and coordinate with their staff, just as schools plan and coordinate to permit a student with diabetes to check her insulin during the school day. The "minor inconvenience" to a school of accommodating

the service animal should not outweigh the potential injury to a student of "both her working relationship with her dog and her dignity and self-respect" when her service animal is denied access. *Sullivan*, 731 F. Supp. at 961. The ADA accommodation process is the proper forum for resolving these issues.

Indeed, public entities under Title II and places of public accommodation under Title III are often called upon to modify their procedures to accommodate service animals. For example, as a place of public accommodation under the ADA, a hospital must permit service animals, but it also must balance concerns about staff and patients' allergies or fears. *See* 42 U.S.C. § 12181(7)(F). Zoos must accommodate service animals while also ensuring the safety of their own animals and visitors, particularly where natural predators of service animals are involved. 42 U.S.C. § 12181(7)(I); *see* U.S. Dep't of Justice, Civil Rights Division, Disability Rights Section, *Frequently Asked Questions about Service Animals and the ADA*, at Question 26. Day care centers must accommodate people with disabilities who use service animals while also protecting young children who may not yet understand how to safely interact with dogs and may not exercise control and caution around unfamiliar animals. 42 U.S.C. § 12181(7)(K).

In short, the valid considerations for denying access to a service animal are already addressed within the ADA framework, and that framework does not require a showing that the service animal be necessary

for the child's appropriate education. *See* 28 C.F.R. §§ 35.130(b)(7), 35.136, 35.139. The criteria to determine whether a public entity should accommodate a service animal under the ADA are limited and uncomplicated. Under the ADA, a public entity may review whether the service animal meets the regulatory definition, whether permitting the service animal is reasonable and necessary, and whether the service animal would fundamentally alter the nature of the entity's services or otherwise pose an undue burden. 28 C.F.R. §§ 35.130(b)(7); 35.136. The ADA regulations contemplate a process where a person with a disability responds to limited inquiries by the public entity when the need for the service animal is not obvious, and is then granted access with his or her service animal. 28 C.F.R. §§ 35.136(a); 35.136(f).

Accordingly, the administrative process and reliance upon educational expertise that are the hallmarks of the IDEA are neither required for nor suited to service animal decisions. It is not necessary, for instance, that the seven categories of people who compose an IEP team, 34 C.F.R. § 300.321, be consulted to decide whether the custodian or school secretary will accompany the service animal outside for relief breaks. *Cf. Christopher S. v. Stanislaus Cty. Office of Ed.*, 384 F.3d 1205, 1213-14 (9th Cir. 2004) (rejecting the argument that students with autism were required to exhaust administrative remedies under IDEA, in part because "determining whether lunch and recess may be counted as instructional time in this case does not

require administrative expertise."). And, as discussed, compelling the IEP process for service animal decisions may also have the detrimental effect of delaying what should be an expedient decision and forcing students and families to wait needlessly for access.

* * *

For these reasons, the Sixth Circuit's judgment should be reversed. The exhaustion rule of § 1415(*l*) does not apply where the relief actually sought in the complaint may not be awarded under the IDEA, the complaint seeks to remedy a general policy of discrimination, or the complaint concerns the vindication of rights that are unrelated to the core functions of the IDEA and do not necessitate the expertise of administrators in devising an education plan. Issues relating to the use of service dogs in schools are best resolved under the ADA rather than the IDEA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LISA MADIGAN
Attorney General
State of Illinois

LORI SWANSON
Attorney General
State of Minnesota

DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
MEGHAN P. CARTER
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5376
* Counsel of Record

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STACY FRY, BRENT FRY, AND E.F., A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS NEW YORK, EQUIP FOR EQUALITY, AND AUTISTIC SELF ADVOCACY NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TAUNA M. SZYMANSKI
Counsel of Record
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20037
tszymanski@hunton.com
(202) 955-1500
Counsel for Amici Curiae

August 29, 2016

[Additional Counsel Listed on Inside Front Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Of Counsel:

Ronald M. Hager
NATIONAL DISABILITY RIGHTS NETWORK
820 First Street, NE
Suite 740
Washington, D.C. 20002

Cliff Zucker
DISABILITY RIGHTS NEW YORK
725 Broadway
Suite 450
Albany, NY 12207

Laura J. Miller
EQUIP FOR EQUALITY
20 North Michigan Avenue
Suite 300
Chicago, IL 60602

Samantha Crane
AUTISTIC SELF ADVOCACY NETWORK
P.O. Box 66122
Washington, D.C. 20035

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INTERESTS OF *AMICI CURIAE*

Amici and their members represent students with disabilities like E.F. who have been prevented from seeking the relief guaranteed to them under civil rights laws because of the misinterpretation of the statutory provision at issue in this case.[1] This brief describes the harms resulting from this misinterpretation.

The National Disability Rights Network (NDRN) is the non-profit membership association of protection and advocacy (P&A) and Client Assistance Program (CAP) agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories, with a Native American Consortium affiliate located in the Four Corners region. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN provides to its members training and technical assistance, legal support, and legislative advocacy. It works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education-related cases under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. Petitioners and Respondents have filed letters granting blanket consent to the filing of *amici* briefs.

and the Americans with Disabilities Act make up a large percentage of the P&A/CAP system's caseload, with over 10,000 such matters handled in the most recent year for which data is available. Limited resources prevent our agencies from accepting even greater numbers of potentially meritorious cases.

Disability Rights New York (DRNY) is the federally authorized P&A agency for people with disabilities in New York State. DRNY has helped thousands of children with disabilities obtain the education they are entitled to under the Individuals with Disabilities Education Act and enforce their rights under the Americans with Disabilities Act and Section 504. DRNY provides these services under federal laws that authorize it to protect and advocate for the rights, safety, and independence of people with disabilities.

Equip for Equality (EFE) is an independent, non-profit, civil rights organization and P&A agency for people with disabilities in Illinois. EFE's mission is to advance the human and civil rights of children and adults with physical and mental disabilities. To this end, EFE provides information, referral, self-advocacy assistance, and legal representation to people with disabilities throughout the state, with a focus on the rights of children with disabilities. EFE represents approximately 1,500 children with disabilities in disputes with school districts every year, devoting significant resources to ensuring children with disabilities are provided the accommodations and services they need to access school and society.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, non-profit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public poli-

cies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, promoting access to health care and long-term supports in integrated community settings, and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities. ASAN currently represents several public school students seeking relief under Title II of the Americans with Disabilities Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years, Congress has safeguarded the rights of children with disabilities to equal access, equal opportunity, and freedom from discrimination. Extending equal rights to those with disabilities reflects our national values, and aligns with the gradual expansion of civil rights and access to justice to other historically powerless segments of society.

This case is about the barriers children with disabilities face when attempting to enforce those civil rights. The decision under review, *Fry* v. *Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016), Pet. App. 1-35, and others like it in the First, Second, Third, Seventh, Tenth, and Eleventh Circuits, see Pet. 13; U.S. Br. on Cert. 18-19, reduces children with disabilities to second-class citizens in our system of justice when they seek relief for violations of their civil rights that

happen to occur during the school day. No such obstacle exists if children experience those violations *outside* the school context, or if schools violate the civil rights of *adults* or *non*-students with disabilities.

Congress expressly provided in the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), that when the "relief" a child with a disability "seek[s]" for a civil rights violation is not "available" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*, the child need not endure the futility of seeking that relief under the IDEA's administrative hearing process.

Despite the plain language of the HCPA, the Sixth Circuit and others have interpreted that law to impede a child from accessing justice through the court system if either the alleged violation or the relief sought even remotely "relate[s] to ... education[]." *Fry*, 788 F.3d at 625; Pet. App. 6; see also, *e.g.*, *Charlie F.* v. *Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996) (exhaustion under the IDEA required if claim "deals with acts that have both an educational source and an adverse educational consequence"). This flagrant rewriting of the statute has caused significant harm to children with disabilities. Justice is not merely delayed for those children; the spectre of months or years of costly and categorically futile proceedings before being allowed to seek the relief they plainly possess under civil rights laws deters many from seeking justice in the first place.

Civil rights laws provide students with disabilities a number of substantive rights, entitlements, and protections that do not co-exist under special

education law. For example, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq.*, and its implementing regulations, 28 C.F.R. Part 35, expressly allow a child with a disability to bring her service dog to school, *id.* § 35.136(g). The ADA prohibits discrimination on the basis of disability, requires schools to be made accessible to students with disabilities, and prohibits such students from being "excluded from participation in, or be[ing] denied the benefits of the services, programs, or activities" of the school. *Id.* § 35.149. Schools are also required to "furnish" a student with a communication-related disability the "auxiliary aids and services" requested to ensure that their communications "are as effective as communications with others" in order to provide "an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity" of the school. *Id.* § 35.160(a)(1), (b). The IDEA provides no such rights.

When substantive civil rights like these are violated, students are entitled to seek relief in the form of either damages or equitable remedies, like a declaratory judgment or preliminary injunction. Few IDEA hearing officers have the authority to award such relief for the violation of a right that does not exist under the IDEA. In other words, as IDEA hearing officers routinely note in rejecting jurisdiction over such claims, the special education administrative process *as a matter of law* cannot provide relief for violations of *other* statutes where the right at issue is absent from the IDEA.

The Sixth Circuit's command to suffer *additional* months or years of civil rights violations without access to justice is inflicted on the population least able to endure such harm—children with disabilities.

Critical development time is wasted without relief from infringements on their rights, including the ability to attend school free from discrimination and to access the independence, opportunities, and supports to which they are entitled.

Any concern that children with disabilities will abuse their statutory right to access the courts is unfounded. Children do not lightly sue their teachers. Moreover, because IDEA hearing officers, who in some states need not even be lawyers, have no authority to provide the relief sought, the claims for relief will almost certainly end up in court anyway. Requiring children to endure a pointless administrative process wastes rather than conserves public resources. Denying a certain class of individuals with disabilities the ability to seek relief expressly granted to them by Congress is discriminatory.

In 1990, Congress found that persons with disabilities "have often had no legal recourse to redress ... discrimination," 42 U.S.C. § 12101(a)(4), and articulated as a central purpose of the ADA "to provide clear, strong, consistent, *enforceable* standards *addressing* discrimination against individuals with disabilities," *id.* § 12101(b)(2) (emphases added). Second-guessing the relief sought by children with disabilities and dictating the path by which they *must* seek enforcement of their independent rights is paternalistic and imposes on them a stricture that is not imposed on other plaintiffs. Congress expressly sought to remedy such "overprotective rules and policies" when it enacted the ADA. *Id.* § 12101(a)(5).

ARGUMENT

I. Misreading the HCPA To Impede Access to Justice Contravenes National Values and Decades of Concerted Legislative Efforts To Eradicate Such Barriers.

Our nation was founded to secure liberty, justice, and rights of redress for its citizens.[2] Over our nearly 250-year history we have progressively endeavored to ensure that *all* citizens—regardless of race, heritage, gender, sexual orientation, age, and ability—obtain equal rights, equal protection, and equal access to justice. While not without the occasional notable detour, as Dr. Martin Luther King observed, "the arc of the moral universe is long, but it bends toward justice."[3] The depth, breadth, and consistency of this commitment to the rights of liberty, justice, and equality are the foundation of our country's strength and resilience.

The founders established a robust judicial system to protect citizens against threats to those rights. Alexander Hamilton is well known to have said that

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[2] See, *e.g.*, U.S. CONST. pmbl. ("in Order to form a more perfect Union, establish Justice, ... and secure the Blessings of Liberty to ourselves and our Posterity"); *id.* amend. I ("Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."); *id.* amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ...."); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens ...; nor deny to any person ... the equal protection of the laws.").

[3] Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march.

"the first duty of society is justice." To that end, the judiciary's role is to protect against unconstitutional laws ensuring that the accretion, erosion, and administration of civil rights is not capricious. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Just as the universe of people protected by our laws has expanded, so has access to the court system to enable enforcement of those rights. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 522-23, 524, 525 (2004) (finding Congress enacted the ADA "against a backdrop of pervasive unequal treatment," "systematic deprivations of fundamental rights," and a "pattern of unconstitutional treatment in the administration of justice," and to enforce "basic constitutional guarantees" like "the right of access to the courts," the "infringements of which are subject to more searching judicial review").

Within the last century, Congress has codified these rights and protections in statute, including in the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). Section 1983 dates to the post-Civil War era, extending to freed slaves the rights and protections of the U.S. Constitution and other laws. 42 U.S.C. § 1983.[4] And more recently, over the past 40 years, Congress has established and affirmed that individuals with disabilities

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[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...." 42 U.S.C. § 1983.

possess—and are entitled to enforce—"equality of opportunity, full participation," and the same rights in society as nondisabled individuals. 42 U.S.C. § 12101(a)(7); see also Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794; *Tennessee*, 541 U.S. at 536 (Ginsburg, J., concurring) (ADA "[i]nclud[ed] individuals with disabilities among people who count in composing 'We the People'"). These laws guarantee people with disabilities equal access, equal opportunity, and freedom from discrimination.

The Sixth Circuit's holding in *Fry* eviscerates the civil rights expressly granted to children with disabilities, and flies in the face of our country's core values as repeatedly affirmed in decades of Congressional efforts to protect and expand those rights. Having been granted the indisputable right to bring a service dog to school under the ADA, and the right to relief in the form of money damages for the school's violation of this civil right, E.F. was prevented from accessing justice to enforce those rights. The requirement that E.F. undergo a lengthy administrative proceeding that cannot as a matter of law provide the remedy she seeks renders impotent the rights expressly granted to her under the ADA. The inequity inherent in this result is especially stark when considering that E.F. would face no such obstacle in redressing a violation of her right to bring her service dog to an *after*-school program at the same school. The decision below undermines the fundamental principle embedded in this country's founding and reinforced in repeated legislative efforts ever since that the ability to enforce a right necessarily accompanies the possession of that right.

Without the ability to enforce it, the right does not exist.

The Sixth Circuit's rewriting of the HCPA effectively destroys the fundamental rights and equal protections Congress granted to children with disabilities under the civil rights laws. Delaying justice to children with disabilities, forcing them to first endure months and years of a futile administrative proceeding, denies them that justice.

II. Preventing Children with Disabilities from Accessing Justice Causes Significant Harm.

This case is about access to justice. When a child's civil rights are violated, the child has a fundamental right to seek redress. Congress enacted the HCPA to affirm its longstanding intent to provide children with disabilities strong civil rights protections and to ensure they are able to seek the remedies available under those laws for violations of those rights. See H.R. REP. NO. 99-296, at 4 (1985) (HCPA intended to "reaffirm ... the viability of [civil rights] statutes as separate vehicles for ensuring the rights of handicapped children"). The sole exception to the right of a child with a disability to seek relief in court from a civil rights violation is when the child seeks relief that is identical to what is afforded to him under the IDEA. 20 U.S.C. § 1415(*l*). In those limited situations, the child must seek the relief first through the IDEA's administrative hearing process. *Id.*

When, however, a student with a disability like E.F. "seek[s] relief that is ... available under" a civil rights law but that is *not* available under the IDEA, the student need not go through the IDEA administrative process. *Id.* There would be no point to such an exercise.

Contrary to the opinion of the lower courts in this case, the question is not whether the relief sought "implicate[s] issues relating to [an] [individualized education program]," *E.F.* v. *Napoleon Community Schools*, No. 12-15507, 2014 WL 106624, at *5 (E.D. Mich. Jan. 10, 2014), *aff'd*, *Fry* v. *Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *and cert. granted*, 136 S. Ct. 2540 (2016); Pet. App. 49, or whether the claims "relate to the specific educational purpose of the IDEA," *Fry*, 788 F.3d at 625; Pet. App. 6. The only relevant question under the statute is whether the "relief [sought] is also available under" the IDEA. 20 U.S.C. § 1415(*l*). When it is not, children may seek the relief available to them under the civil rights laws, even when the relief sought might have something to do with the child's education. Any contrary interpretation not only violates the plain language and clear intent of the statute, but also inflicts significant harms on children with disabilities.

E.F.'s civil rights were violated when she was refused access to school with her service dog Wonder, a right of access expressly granted to her under the ADA.[5] 28 C.F.R. § 35.136(g). To remedy that violation, E.F. sought relief available to her under the ADA in the form of monetary damages. The lower courts closed the door on her attempt to seek this relief because she had not yet endured the lengthy and costly—yet completely futile—administrative hearing process under the IDEA, even when there was no question that E.F. was not "seek[ing]" *any* "relief" "available" under the IDEA.

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[5] A video of E.F. working with Wonder is available here: https://youtu.be/PIfyHn2_lmE.

The Sixth Circuit's rewriting of the HCPA denied E.F. access to justice and her right to seek a remedy for a violation of her civil rights. The harms E.F. experienced are not unique. Students with disabilities are routinely prevented from seeking justice when they experience discrimination. They face obstacles not faced by adults, or by children with disabilities in other settings.

A. The Sixth Circuit's Decision Hinders Children with Disabilities from Seeking Equitable Relief for Disability Discrimination and Other Violations of Their Civil Rights.

Because monetary damages are a form of "relief" that is not "available" under the IDEA, 20 U.S.C. § 1415(*l*), the relief E.F. seeks, which clearly *is* "available" under the civil rights laws—falls squarely within the exception to the HCPA exhaustion requirement.

In addition to monetary damages, civil rights laws like the ADA, Section 504, and Section 1983 afford children with disabilities the ability to seek *equitable* relief for violations of their civil rights. See, *e.g.*, 42 U.S.C. § 1983 (authorizing a "suit in equity"); *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 289 (2d Cir. 2003) (neither Section 504 nor Title II of the ADA "displays any intent by Congress to bar a suit [for injunctive relief] against state officials in their official capacities"). When a child is discriminated against on the basis of disability, or when she is unable to access a public service because of a failure to be furnished with reasonable supports or communication aids, for example, she is entitled to seek, among other forms of relief, a declaratory judgment that the school has violated her rights, and a prelim-

inary injunction to enforce her rights during the pendency of any litigation. *Id.* at 290; 42 U.S.C. § 1983 (authorizing "declaratory relief").

The IDEA, a spending clause statute aimed at ensuring students with disabilities are provided a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), has a significantly different purpose and reach than the civil rights laws that protect those same students, including the ADA, Section 504, and Section 1983. The IDEA provides procedural protections and substantive entitlements, but the provision of access, services, and accommodations to children under that law largely depends on who wins a fact-intensive debate about whether such things are "appropriate" for the child, a narrow and imprecise standard that, in application, is untethered to the child's civil rights. As Petitioners point out, the IDEA offers "limited substantive protection," "guarantee[ing] only a 'basic floor of opportunity'" rather than "'equal' educational opportunities,'" the latter of which *are* guaranteed to students with disabilities under civil rights laws. Pet. 4-5 (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 198, 201 (1982)).

By contrast, the civil rights laws provide affirmative protections and substantive rights of access and entitlements to students with disabilities, obligations that in many cases exceed what is required of school districts under the IDEA. A child who seeks equitable relief for a violation of such rights in the school context—even when such relief cannot be obtained under the IDEA hearing process because the protections categorically do not co-exist under the IDEA—is prevented from seeking such relief in the circuits that have adopted the Sixth Circuit's position in *Fry*.

This misapplication of the IDEA exhaustion requirement prevents children with disabilities from seeking relief from violations of the rights they possess solely under civil rights laws when those rights are construed to have any relevance to education. In effect, the *Fry* decision and its brethren have caused children with disabilities to suffer *substantive* harms.

1. Children with Disabilities Are Denied the Ability To "Seek Relief" Under the IDEA Administrative Process from Violations of Their Civil Rights.

The first appellate case to misinterpret the HCPA found that a fruitless IDEA hearing was a prerequisite for a fourth-grader to seek relief from disability-based harassment and discrimination committed by his teacher and classmates. *Charlie F.*, 98 F.3d at 992. Charlie F.'s counsel pointed out that, because the IDEA provides no general protection or entitlement against disability-based discrimination, the relief Charlie F. sought was not available under the IDEA administrative hearing process. And yet, the Seventh Circuit decided that administrative exhaustion could not be avoided by seeking ADA and Section 504 relief that was unavailable under the IDEA, a result that cannot be reconciled with the plain language of the IDEA. *Id.* Charlie F. could not file a civil action in court to seek the relief to which he was entitled under the ADA and Section 504 to remedy the violation of his civil rights until he had jumped through an onerous hoop that could not provide him the relief he sought. *Id.*

The ADA also provides that public facilities, including schools, be physically accessible to students with mobility impairments. 28 C.F.R. §§ 35.133,

35.137. The U.S. Department of Education's Office of Civil Rights (OCR) noted in its May 2012 determination regarding the violation of E.F.'s civil rights, that limiting a student's ability to choose a particular mobility aid "would inappropriately inhibit the student's independence and result in discrimination." Joint Appendix 35. For example, the OCR observed that a school would violate the antidiscrimination requirements of the ADA and Section 504 "if it required a student who uses a wheelchair to be carried or if it required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane." *Id.*

As the OCR noted, there is no concomitant obligation under the IDEA that a school ensure a student with a mobility impairment be able to access all areas of the school. *Id.* Thus, a student in a wheelchair who cannot access the fourth floor of the school building to take an elective music class (not required for him to receive a "free appropriate public education") because the elevator only reaches the third floor, would have the right to seek relief under the ADA and Section 504, but would not be able to seek relief under the IDEA.

Another example of a right absent from the IDEA but provided under civil rights laws is the right to be "furnish[ed]" with "[t]he type of auxiliary aid or service necessary to ensure effective communication ..., *giv[ing] primary consideration to the requests of individuals with disabilities* ... in a timely manner." 28 C.F.R. § 35.160(b)(1) & (2) (emphasis added). The ADA's effective communication regulations are intended to remedy the "discriminatory effects of ... communication barriers," 42 U.S.C. § 12101(a)(5),

and "to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of" a public service or program, 28 C.F.R. § 35.160(b)(1).

No such right is provided to students with disabilities under the IDEA. An "individualized education program" could include an assistive communication device, but there is no obligation under the IDEA to furnish that student with his requested method in a timely manner. See *K.M. ex rel. Bright* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, *and cert. denied*, 134 S. Ct. 1494 (2014) (concluding school district obligations under the IDEA and ADA with regard to communication supports "are significantly different").[6]

Whereas school teams can refuse to provide effective communication auxiliary aids and services, permit a service dog in school, or ensure access to the elective class on the fourth floor, if such things are not necessary to ensure a student's minimal educational progress, they cannot, with rare exceptions, be refused under the ADA. See *Fry*, 788 F.3d at 633 (Daughtrey, J., dissenting) ("the two anti-discrimination laws and the IDEA could function as complements, but their focus and the obligations that

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[6] See also U.S. Department of Justice & U.S. Department of Education, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools at 1 (Nov. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf ("Public schools must comply with all three laws [the ADA, Section 504, and the IDEA], and while compliance with one will often result in compliance with all, sometimes it will not.").

they impose are independent of one another"), Pet. App. 24.

These examples of substantive standards afforded under civil rights laws but not under the IDEA demonstrate a variety of circumstances in which a child with a disability might experience a civil rights violation but have no way to "seek relief"—either equitable or monetary—for that violation because IDEA hearing officers cannot award equitable or monetary relief for the violation of a right or standard that is not available under the IDEA. There is no way students with service dogs or physical or communication-related disabilities could possibly obtain the relief of a declaratory judgement or preliminary injunction through the IDEA administrative hearing process.[7]

The correct, straightforward reading of the HCPA is that it would *not* mandate that students with disabilities go through the IDEA administrative hearing process before being able to seek relief under the civil rights laws. Equitable relief for violations of civil rights that do not co-exist under the IDEA are

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[7] Significantly, school districts, and even some courts, have claimed that the IDEA's exhaustion requirement somehow absolves school districts from the obligation to comply with civil rights laws as long as they comply with the IDEA. See, *e.g.*, Letter from Francisco M. Negrón, Jr., Gen. Counsel, Nat'l Sch. Bds. Ass'n, to The Hon. Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., et al., at 3-4 (Mar. 5, 2015), https://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf; see also Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY, Iss. 2, 611, 626-27 & n.80 (2012), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1154&context=naalj.

not "available" to be "sought" under the IDEA administrative hearing process. An IDEA hearing officer simply has no authority to enforce or relieve disability-based discrimination, or the ADA's effective communication, service dog, or equal access provisions. Because the relief sought by students for violations of those rights is not available under the IDEA to be "sought," there is no reason for such students to "exhaust" under the IDEA. Forcing them to do so is as futile as it is for E.F., where the relief she seeks—monetary damages—is simply unavailable under the IDEA.

The Sixth Circuit's holding in *Fry* misreads a narrow spending clause statute and deprives students with disabilities of equal protection and civil rights, a result Congress clearly did not intend.

B. E.F. Is Not Alone

Amici and their members have firsthand experience with the challenges students with disabilities like E.F. routinely face around the country when asserting their civil rights in school. Requiring children to go through an onerous but futile administrative process before being able to seek relief for violations of their civil rights is costly and emotionally draining, and serves to deter many from asserting their rights in the first place.

1. Second Circuit: New York's S.W.

In July 2012, the parents of S.W., a nine-year-old with autism spectrum disorder, retained a lawyer to seek equitable relief for a violation two months earlier by the Sachem Central School District of his ADA right to bring his service dog to school. Because of the Second Circuit's *Fry*-equivalent, *Cave* v. *E. Meadow Union Free Sch. Dist.*, 514 F.3d 240 (2d Cir.

2008), S.W. was prevented from seeking relief from the civil rights violation until he exhausted New York's especially lengthy, two-tier IDEA administrative hearing process. He filed a hearing request in October 2013.

S.W.'s first IDEA hearing took nine days, spread out over several months in 2014. The school district appealed to the second tier in New York's process, and a final decision was issued in March 2015, determining that neither IDEA hearing officer had jurisdiction over S.W.'s ADA and Section 504 claims and that the child therefore was not entitled to relief under the IDEA administrative hearing process.

In May 2015, after enduring more than nineteen months of a fruitless IDEA administrative hearing process and nearly three years since the school first violated his civil rights, S.W., with the assistance of *Amicus* Disability Rights New York, filed for enforcement of his ADA and Section 504 rights in federal court, something he would have been able to do in May 2012, had the HCPA been interpreted correctly by the Second Circuit in *Cave. Child with Disability* v. *Sachem Cent. Sch. Dist. Bd. of Educ.*, No. 2:15-cv-02903-SJF-ARL (E.D.N.Y. filed May 19, 2015). S.W. was unlawfully and unnecessarily prevented from seeking equitable relief, including a preliminary injunction, for the deprivation of his right to access school with his service animal.

2. Fourth Circuit: North Carolina's A.S.

At the start of the 2010-2011 school year, a school district in North Carolina refused to permit four-year-old A.S., a student with developmental disabilities, to bring his service animal, Chatham, to school. When efforts to resolve the issue informally failed,

A.S., represented by *Amicus* National Disability Rights Network member Disability Rights North Carolina, filed an action in federal court under the ADA and Section 504. *A.S. ex rel. Leonel S.* v. *Catawba Cty. Bd. of Educ.*, No. 5:11CV27-RLV, 2011 WL 3438881 (W.D.N.C. Aug. 5, 2011). A.S. sought a declaratory judgment that the school district had violated the ADA and Section 504, an injunction requiring the district to allow him to bring his service animal to school, and monetary damages. *Id.* at *2. The court dismissed for failure to exhaust under the IDEA. *Id.* at *7-8.

Following dismissal, A.S. filed a request for an administrative hearing. The hearing officer agreed with the parents that there were no IDEA claims and dismissed the ADA and Section 504 claims, citing a lack of jurisdiction over those claims. In the meantime, A.S. also filed a complaint with the OCR and the case resolved soon thereafter.

The misinterpretation of the HCPA forced A.S. to pursue a useless IDEA administrative process, and to attend school for an entire school year without access to his service animal.

3. Tenth Circuit: New Mexico's A.F.

A.F., a teenager with dyslexia near Los Alamos, New Mexico, filed a suit for damages against Española Public Schools in August 2012 under Section 1983, Section 504, and the ADA, *after* resolving through mediation and a binding resolution agreement her IDEA claims regarding the district's failure to evaluate or identify her for suspected disability and eligibility for special education. *A.F. ex rel. Christine B.* v. *Española Pub. Schs.*, 801 F.3d 1245, 1251-53 (10th Cir. 2015) (Briscoe, C.J., dissenting).

The suit sought, among other relief, damages for disability discrimination, emotional distress, and loss of equal educational opportunities. *Id.* at 1253.

Although there was no IDEA claim left to exhaust and the remedy sought—damages—was not available under the IDEA, the Tenth Circuit nevertheless affirmed dismissal of the suit for failure to exhaust administrative remedies under the IDEA. *Id.* at 1250-51 (majority opinion).

4. First Circuit: Puerto Rico's A.V.R.

In a 2015 example from Puerto Rico, A.V.R., a girl with a disability, sued the Puerto Rico Department of Education under the ADA seeking injunctive relief and monetary damages for failure to ensure school facilities and equipment were wheelchair-accessible. *Rivera-Quiñones* v. *Dep't of Educ. of Puerto Rico*, 125 F. Supp. 3d 391 (D.P.R. 2015). The court dismissed the ADA claims for failure to exhaust the IDEA administrative process, because her claim "relates to the provision of a student's education," *id.* at 396, denying A.V.R. the opportunity to pursue preliminary injunctive relief under the ADA, and consigning her to a lengthy IDEA administrative process that could not address her ADA claims. The court also refused to grant preliminary injunctive relief under the IDEA in part because the administrative process had not been exhausted, disregarding the potential harms of prolonged discriminatory exclusion on young children. *Id.* at 394. If A.V.R. had been able to access the court on her ADA claim, she could have obtained injunctive relief as a matter of law

5. Seventh Circuit: Illinois's K.D.

Amicus Equip for Equality represented the family of K.D., a six-year-old boy with autism, in filing a

complaint and seeking and obtaining a temporary restraining order from the Sixth Judicial Circuit in Douglas County, Illinois, after K.D. was barred from attending summer school with his service dog, Chewey. *Nichelle Drew* v. *Villa Grove Cmty. Unit Sch.*, No. 2009CH27 (Douglas Cty. Cir. Ct., IL 2009), *aff'd, K.D.* v. *Villa Grove Cmty. Unit Sch.*, 936 N.E.2d 690 (Ill. App. Ct. 2010). Chewey is a yellow lab who was acquired and specially trained as a service dog to help calm K.D. and to prevent him from wandering.[8]

Despite K.D.'s clear right under the ADA to attend summer school accompanied by Chewey, his claim was brought under a state service animal access law to avoid a dispute that K.D.'s failure to exhaust IDEA remedies would bar relief sought under federal civil rights laws. In this case, exhausting IDEA claims would not have brought K.D. the relief sought because his parents did not contend that K.D. needed to be accompanied by his service animal to receive a free appropriate public education under the IDEA. The complaint merely sought enforcement of K.D.'s right to access school accompanied by Chewey.

Despite this calculated attempt to avoid the misapplication of the HCPA to their case, significant resources were expended to defend against the school district's insistence at every step in the litigation—the temporary restraining order hearing, the preliminary injunction hearing, the trial, and the appellate

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[8] See Patrick Yeagle, *Dog fight ends with hall pass: School admits second-grader with service dog*, ILLINOIS TIMES (Sept. 9, 2010), http://illinoistimes.com/article-7735-dog-fight-ends-with-hall-pass.html.

argument—that K.D. could not lawfully enforce his right to access school with Chewey before going through the IDEA administrative process. This is just one example where the misinterpretation of the HCPA has deterred potential plaintiffs from seeking to enforce their civil rights under federal law. Not every state has a state law remedy that enables students to avoid the futile, lengthy exhaustion that *Fry* requires. Children should not have to forego their federal civil rights to seek justice, and in most states that option will not be available.

6. Fourth Circuit: Virginia's "Arlington Five"

A final example is the "Arlington Five," five students between the ages of nine and nineteen with apraxia, a neurological condition that prevents them from using speech to communicate. In August 2014, the first member of the Arlington Five requested that his preferred effective method of communication—pointing to letters on a low-tech alphabet board to spell out words and sentences—be accommodated as an auxiliary aid and service at school.[9] Arlington Public Schools denied his, and each other student's request.

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[9] Letter from Samantha Crane, Legal Dir. & Dir. of Pub. Policy, Autistic Self Advocacy Network, to Rebecca B. Bond, Chief, & Anne Raish, Acting Principal Deputy Chief, Disability Rights Section, Civil Rights Div., U.S. Dep't of Justice at 7 (Mar. 7, 2016), http://autisticadvocacy.org/wp-content/uploads/2016/03/ADA-Discrimination-Complaint-Against-Arlington-Public-Schools.pdf; see also *id.* at 7-8, nn. 11-16 (providing links to videos of members of the Arlington Five communicating with an alphabet board).

In each case, the school district asserted that because the IDEA does not require it to provide the student's preferred method, they need not comply with their clear ADA obligation to do so. Instead, it offered other methods that were dramatically less effective. The Arlington Five cannot afford to go through a futile IDEA hearing process before seeking the relief to which they are entitled under the ADA, in part because three are close to aging out of public education and in part because four out of the five students can no longer tolerate the frustration of spending each school day without any effective form of communication. Only one of the Arlington Five remains enrolled in Arlington Public Schools. Without the ability to pursue their ADA claim, they are effectively prevented from independently enforcing their civil rights. Instead *Amicus* Autistic Self Advocacy Network, which represents the Arlington Five, has petitioned the U.S. Department of Justice to enforce the ADA on their behalf.

* * *

When the students identified above go to college, the obstacles they have faced at the elementary and secondary levels to accessing justice under civil rights laws will evaporate simply because the IDEA is no longer implicated. Earlier this year, deaf and hard of hearing students at Harvard University were able to go straight to court to seek injunctive and declaratory relief under the ADA and Section 504 for an alleged failure by the university to provide equal access to online audio and audiovisual content. *Nat'l Ass'n of the Deaf* v. *Harvard Univ.*, No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *1 (D. Mass. Feb. 9, 2016). As seniors in high school in the Sixth Cir-

cuit (or the First Circuit, where Harvard is located), they would have been unable to file that complaint.

None of the stark examples described in this brief would exist if the HCPA were interpreted in accordance with its plain language and Congressional intent. In each example, the students have clearly suffered civil rights violations, and in each case they have either been blocked from directly exercising their right to seek relief under civil rights laws, or have been deterred by the spectre of months and years of a futile administrative hearing process. During this time, if their families lack the resources to homeschool them, place them in a private school, or to move to another school district, they are forced to endure continued discrimination and violations of their rights while awaiting to access the courts as they are statutorily entitled. *Amici* are aware of many additional examples of families who have never even *sought* to enforce their children's civil rights because they could not afford—financially or emotionally—the prerequisite IDEA administrative process before being able to seek relief in court.

These unjust results will continue if *Fry* is not reversed.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, the judgment below should be reversed.

Respectfully submitted,

TAUNA M. SZYMANSKI
Counsel of Record
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20037
tszymanski@hunton.com
(202) 955-1500

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Counsel for Amici Curiae

RECORD AND BRIEF.

No. 15-497

IN THE

Supreme Court of the United States

STACY FRY, ET VIR., AS NEXT FRIEND OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, MICHIGAN SCHOOL BOARDS ASSOCIATION, AASA THE SCHOOL SUPERINTENDENTS ASSOCIATION, ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF RESPONDENTS

Francisco M. Negrón, Jr.
General Counsel
National School Boards Association
1680 Duke Street, FL 2
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

Thomas B. Allen
Counsel of Record
W. Joseph Scholler
Alexander L. Ewing
Jack B. Hemenway II
Frost Brown Todd LLC
9277 Centre Point Dr.
Suite 300
West Chester, OH 45069
(513) 870-8200
tallen@fbtlaw.com

Counsel for Amici Curiae

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QUESTION PRESENTED

Whether 20 U.S.C. § 1415(l) requires Petitioners to exhaust the state administrative procedures set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, before filing a civil action seeking monetary and declaratory relief under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12201 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

INTERESTS OF *AMICI CURIAE*

In accordance with Supreme Court Rule 37, *Amici Curiae*, National School Boards Association (NSBA), Michigan Association of School Boards (MASB), AASA The School Superintendents Association (AASA), Association of School Business Officials, International (ASBO), and National Association of State Directors of Special Education (NASDSE) respectfully submit this brief in support of the Respondents.[1] **NSBA** is a national organization that represents state school boards associations and their more than 90,000 local school board members. NSBA believes education is a civil right and that public education is America's most vital institution.

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

NSBA advocates for equity and excellence in public education through school board leadership. NSBA is the premier advocate for public education in the United States. **MASB** is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in the state. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. **AASA** is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement and help shape policy, oversee its implementation and represent school districts to the public at large. **ASBO** is an educational association that supports school business professionals who are passionate about quality education. ASBO provides programs, services, and a global network to promote the highest standards of school business management, professional growth, and the effective use of educational resources. ASBO's mission is to lead the profession of school business forward through professional growth opportunities, programs, and services. **NASDSE** is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's primary mission is to serve students with disabilities

by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici have a profound interest in how this case is resolved because the Court's decision will impact the ability of schools across the nation to address effectively the needs of special education students. *Amici* and their members believe that all children should have equal access to an education that maximizes each student's individual potential. To accomplish this goal, *Amici*, without addressing the specific facts of this case, seek to offer arguments and information that will help this Court reach a decision reinforcing the use of collaborative means to resolve the disagreements that arise between parents and schools about special education matters. To that end, we urge this Court to affirm the decision of the Sixth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

It is critical that this Court affirm the decision of the Sixth Circuit Court of Appeals, which held that students with disabilities are required to exhaust the IDEA administrative processes before bringing a suit in court to challenge a school district's provision of services or accommodations related to their disabilities. A strong exhaustion requirement supports the carefully crafted, collaborative framework Congress designed for students, parents, and school districts to develop a comprehensive and integrated education program for a child. Through the interactive and constructive process envisioned by the IDEA, students, parents, educational experts, and other stakeholders work together to develop an

individualized education program (IEP) tailored to meet the child's unique needs. Key to this end goal is ongoing parental communication with educators, therapists, and other experts who have the knowledge and training to devise an appropriate, minimally restrictive, and individually tailored education program for the student. This process helps stakeholders develop solutions that work for everyone.

In the event the parents and school cannot agree through this cooperative team approach on the appropriate special education and related services needed by the child, Congress has provided due process procedures with specified timelines as the primary means to address disagreements. These procedures are designed to encourage informal and early resolution. Litigation, by contrast, is designed to be confrontational; it is inherently inefficient as a dispute resolution mechanism,[2] and is incompatible with the mutual exchange between home and school critical to student well-being and academic success. Allowing litigation as a *first* resort encourages the parties needlessly to adopt adversarial stances rather than taking advantage of the IDEA's collaborative framework. The parties' focus shifts to marshalling evidence, often including expert testimony, to support entrenched positions and to executing adversarial strategies that often have little to do with benefitting

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[2] "Our system is too costly, too painful, too destructive, [and] too inefficient for a truly civilized people." David Margolick, *Burger Says Lawyers Make Legal Help Costly*, N.Y. TIMES (Feb. 13, 1984), *available at* http://www.nytimes.com/1984/02/13/us/burger-says-lawyers-make-legal-help-too-costly.html (quoting Chief Justice Burger's annual "State of the Judiciary" address to the American Bar Association on Feb. 12, 1984).

the education of the student. An open door to litigation mires students, parents, and school districts in unnecessary, time-consuming, and expensive court proceedings that drain resources that could be used to serve the needs of students with disabilities.

The Sixth Circuit Court of Appeals properly concluded that the parents of a student with a disability must exhaust the procedures under the IDEA before filing suit against the school district for denying the student's request to bring a service dog to school. The parents instead must engage in the continuum of collaborative processes, including the due process procedures outlined in the IDEA, before they may invoke another statute to compel a school to provide a particular related service. Unlike other would-be plaintiffs who allege the need for a service dog to access other government or public facilities or programs, a student eligible for services under IDEA is entitled to its considerable procedural protections, and an individualized education program designed by experts with parent input. In exchange, she must use IDEA's procedures to resolve disputes associated with that program before resorting to litigation. *Amici* respectfully urge this Court to affirm the Sixth Circuit's decision and hold that before filing Section 504 or ADA claims in court, students and their families must exhaust administrative remedies under the IDEA when the relief they seek is also available under the IDEA.

I. THE IDEA'S LONG-STANDING EXHAUSTION REQUIREMENT MUST BE INTERPRETED IN THE CONTEXT OF ITS COLLABORATIVE FRAMEWORK.

A. Allowing Students and Parents to Proceed Directly to Court to Pursue a Damages Claim Under Section 504 or the ADA Without Exhausting Administrative Processes Directly Contravenes the Intent of Congress.

Statutory interpretation begins with a review of the language itself, *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991), read in the context of the overall statutory scheme.[3] IDEA's framework clearly shows the intent of Congress that the special education needs of students be addressed collaboratively by parents and schools.[4] When viewed as an integral

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[3] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into an harmonious whole[.]'").

[4] *See, e.g.*, 20 U.S.C. § 1400(c)(8) ("Congress finds the following: Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."); § 1400(d)(1)(3) ("The purposes of this chapter are to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities "); § 1414(b)(2)(A) ("In conducting the evaluation [to determine if the child is a child with a disability], the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining [whether the child has a disability and the content of the child's IEP.]"); § 1414(b)(4)(A) ("[T]he

part of this framework, the exhaustion requirement emerges as the lynchpin ensuring that the positive, constructive mechanisms set in place by Congress have a chance to work. Before litigation ever becomes an option, the exhaustion requirement ensures that: 1) an IEP Team, including the parents, has met to discuss the educational needs of the child, to consider available services and placements that might meet those needs, and to develop individualized educational goals for the child and benchmarks to assess attainment of those goals, 20 U.S.C. § 1414(d)(1); 2) the parties have engaged in a resolution session and/or mediation to resolve any disagreements regarding the education of a student with a disability prior to the commencement of a due process hearing; and 3) in the event a due process hearing remains necessary, that an impartial state official trained in special education matters has reviewed, and ruled on, those disagreements. *See* 20 U.S.C. § 1415(f)-(g) (setting out how disagreements regarding the education of a student with a disability

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determination of whether the child is a child with a disability shall be made by a team of qualified professionals and the parent of the child "); § 1414(d)(1)(B) (the IEP Team consists of the parents of the child with a disability, at least one regular education teacher, at least one special education teacher or provider, and a representative of the local education agency); § 1414(d)(3)(A)(ii) ("In developing each child's IEP, the IEP Team shall consider the concerns of the parents for enhancing the education of their child"); § 1415(e) (providing for mediation of disputes between parents and the local education agency to resolve due process complaints); § 1415(f)(3)(E)(ii) (providing that it is a procedural violation if the procedure "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child[.]").

are to be resolved, including resolution meetings, hearings, and appeals to state agencies from initial hearings).

Amici urge the Court to apply the exhaustion requirement in a manner consistent with preserving the collaborative paradigm[5] designed by Congress to accomplish the IDEA's express educational purposes. Congress intended the IDEA to govern the provision of educational services to children with disabilities. 20 U.S.C. § 1400(d)(1) ("The purposes of [the IDEA] are .

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; (C) and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."). Given the importance of these purposes, numerous courts have rejected attempts to circumvent the IDEA's cooperative and remedial scheme through artful pleading. *See* Resp. Br. at 28-31.

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[5] Research and resources supporting the indisputable benefits of home-school collaboration are widely available. For example, the website of the National Center on Dispute Resolution in Special Education, www.directionservice.org/cadre, offers extensive materials on topics ranging from hearing officer training, to family and professional resources, to legal information—all for the purpose of increasing the capacity of stakeholders to resolve special education disputes collaboratively, thereby reducing the use of expensive adversarial processes.

B. Congress Consistently and Clearly Has Required Exhaustion in Disputes About Services for Students with Disabilities.

Beginning with the 1975 enactment of the Education for All Handicapped Children Act (EHA) (predecessor of the IDEA), Congress has consistently required parents who disagree with the services provided to their children to exhaust administrative remedies under the (now) IDEA before filing a complaint in court. In the EHA, Congress specifically reserved the right to bring a civil action to a party who is "aggrieved by the findings and decision made [in the due process hearing] who does not have the right to an appeal [to the State education agency], and any party aggrieved by the findings and decision [of the State education agency after an appeal]." Pub. L. No. 94-142, § 615, 89 Stat. 773 (1975).

Congress has preserved this requirement in every subsequent amendment to the statute. After this Court determined in *Smith v. Robinson*, 468 U.S. 992 (1984), that the EHA's carefully crafted and comprehensive scheme was the exclusive remedy for disabled students seeking equal access to public education, Congress passed the Education of the Handicapped Act Amendments of 1986 to make clear that the EHA did not foreclose children with disabilities from pursuing remedies to protect their rights under other laws and the Constitution, but that exhaustion of the EHA's administrative procedures applied to *all* claims that sought relief available under the now-IDEA, no matter the legal authority pled in the complaint. Pub. L. No. 99-457, § 680, 100 Stat. 1145 (1986). The Individuals with Disabilities

Education Act, enacted in 1990 as the successor to the EHA, maintained a similar exhaustion requirement in the procedural safeguards provision. 20 U.S.C. § 1415(i)(2)(A). The IDEA exhaustion requirement at issue here states that ". . . before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(l). In sum, over the past 40 years, Congress has made it clear that before filing a complaint in court, parents must work collaboratively with school officials to resolve the dispute, which may or may not lead to the filing of a due process complaint, a resolution session, mediation, or due process hearing. This exhaustion requirement supports the IDEA's collaborative framework, which Congress has repeatedly and purposefully strengthened over a span of decades. This statutory history illustrates Congress' intent to prevent artful pleading from undercutting long-standing procedures that support the educational goals of the Act.

II. WEAKENING THE IDEA'S EXHAUSTION REQUIREMENT WOULD UNDERMINE THE COLLABORATIVE FRAMEWORK CONGRESS DESIGNED TO RESOLVE EDUCATIONAL MATTERS CONCERNING STUDENTS WITH DISABILITIES.

A. Allowing Parents to Pursue ADA and Section 504 Claims Without First Exhausting IDEA Procedures Will Fundamentally Alter the IEP Process.

As this Court has noted, Congress recognized that each child's individual educational needs should be worked out through a process that begins at the local level and includes ongoing parental involvement. *Smith*, 468 U.S. at 1011. The Third Circuit Court of Appeals has echoed this point: "[T]he needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *D.E. v. Central Dauphin Sch. Dist.*, 765 F.3d 260, 274 (3d Cir. 2014) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)). The collaborative IEP process requires a detailed and comprehensive evaluation of the unique needs of a student with disabilities, 20 U.S.C. §1414(d)(1)(A), in order to provide a "full educational opportunity" to that child. 20 U.S.C. § 1412(a)(2). During the development, implementation, and mandatory reviews of the IEP, multiple mechanisms are available to families and schools to work out differences informally, while focusing on the

educational needs of the student. At any time, the school and the family can agree to modify any aspect of the educational plan without the need for the time and expense of legal proceedings.

Parents and schools have been using the IEP due process system successfully for decades. Though each state's system has its own character—and some tend to see more adversarial proceedings than others due to differences in rules about the length of hearings, whether the school district pays hearing expenses, and the like—parties know that when disputes arise about the educational program for an IDEA-eligible student, that statute's procedures must be used. If the Sixth Circuit is reversed, that assumption would evaporate, and the effectiveness of this process would be severely jeopardized. Parents would no longer be required to work collaboratively with school officials, even at the IEP stage. At any point, they could threaten to make any disagreement into a "federal case," or simply withdraw from collaboration and go to court. This would grant near dispositive decision-making power to parents, negate the team approach, and render the IEP process unnecessary and irrelevant.

Under the IDEA, parents have always played a critical and substantial role in the IEP process, but they do not have the right to dictate, by threat of suit or otherwise, what services their child will receive. Instead, their views are considered along with those of teachers, administrators and specialists, such as occupational therapists, school psychologists, and speech and language pathologists. These educational professionals are trained to conduct comprehensive evaluations of the child, in collaboration with the

family, and to consider input from all members of the team before developing an IEP that addresses the child's educational needs in a manner that provides a FAPE. Educational professionals considering how to integrate children with disabilities into regular classrooms may take into account how parentally-proposed placements and services will affect other students. As long as FAPE is provided to the child at issue, the IEP may provide strategies to minimize potential classroom distractions or offer an alternative to the parentally-preferred service based on specific concerns for the welfare or legal rights of other students.[6] For example, the school district here may have had Section 504 obligations to accommodate the dog-allergic students whose parents raised concerns. Finding solutions that balance these competing interests can be challenging for school districts. Nevertheless, using their specialized and team-informed knowledge of the child's needs and their familiarity with district resources, facilities, and pertinent circumstances, school officials are committed to designing individual education plans that are feasible and practical and that make the best use of the district's personnel, programs and services.

If parents are authorized to bypass the IDEA's collaborative process, their children will be deprived of the dedication and expertise that school personnel

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[6] *See, e.g., Case v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247-48 (2d Cir. 2008) (remanding and ordering district court to dismiss service dog case brought under Section 504 and ADA based on plaintiff's failure to exhaust IDEA administrative remedies; the court noted that the school district's concerns about dog-allergic students and staff and potential classroom distractions implicated the student's IEP and would be best dealt with through the IDEA administrative process).

bring to evaluating students' educational needs, designing comprehensive, integrated individualized education programs, problem-solving and correcting errors. This may have a drastically negative impact on special education students, because a decision regarding whether a particular related service or accommodation, such as service dog, is appropriate will be made by a judge, rather than an IEP team or trained mediator or hearing officer. The judge may not be as well-versed in these specific subjects and may not have the benefit of a detailed factual record from due process hearings that Petitioners' approach would render unnecessary. Moreover, a judge deciding a case under the ADA may consider the educational appropriateness of a particular accommodation irrelevant to the determination of whether the district engaged in intentional discrimination to deprive the child of equal opportunity. An IEP team, by contrast, must develop a program with goals "designed to ...meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...." 20 U.S.C. § 1414(d)(A)(II)(aa). The IDEA procedures result in a more complete and informed education program for the student.

If this Court allows parents to abandon the IDEA's collaborative process in favor of direct access to litigation, it is likely to reduce confidence in and commitment to the IEP process overall. Parents who know that litigation is always available have the option at any moment to stop engaging in cooperative decision-making and to put pressure on the school district to accede to their demands. If they choose to

exert this pressure through an attorney, the negotiations may become unduly influenced by the financial incentives for attorneys to continue conflict rather than to reconcile quickly.

Financial rather than educational considerations may also color a school district's decisions regarding the dispute. The cost of a particular service or placement demanded by a family often is less than the cost of a federal lawsuit, even when the district is insured. When a district adds that financial cost to the loss of staff time, and the emotional toll litigation takes on all participants, it may decide to avoid it. Even when parents do not exercise the litigation option, the mere possibility may change the dynamic of the IEP process from team-based consensus building to unproductive tension and suspicion. When the threat of litigation, rather than developing an IEP that appropriately addresses the student's educational needs, becomes the driving force of parent-school discussions, the parties have lost sight of the necessity, purpose and effectiveness of the IEP process.

Under the Petitioners' approach, school personnel who have invested time, energy, and resources in developing and implementing IEPs to serve the interests of students with disabilities may become disheartened and cynical. They may feel frustrated at having to defend their good faith efforts to comply with the IDEA against charges of intentional discrimination under Section 504 and the ADA. They may feel confused as to what additional steps they could have taken (other than acceding to the parents' wishes) to avoid such claims. They may become concerned that their carefully developed

educational plans for a child may be overridden or disrupted by a court decision based on criteria other than serving the child's educational needs.

B. Allowing Circumvention of IDEA's Due Process Procedures to Provide Direct Access to Federal Courts Would Forfeit the Benefits of the Administrative Scheme Congress Designed for Resolving Disputes about Appropriate Programs and Services for Students with Disabilities

1. The Vast Majority of Due Process Complaints Are Resolved Without Protracted Hearings

Contrary to the assertions of Petitioners and some of their *Amici*, the IDEA's due process hearing procedures are designed to be more effective and efficient than federal litigation in deciding the appropriateness of educational programs and services. 20 U.S.C. § 1415(f)(3). As the Sixth Circuit Court of Appeals noted, the IDEA calls for a determination to be issued by a hearing officer within 105 days of the initial filing of the complaint. *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 626 (6th Cir. 2015); *see generally* 34 C.F.R. §§ 300.510-.515. During this time period, IDEA procedures provide an opportunity for the parties to try to resolve the complaint through a mandatory resolution meeting (which may result in a binding, enforceable

agreement) or through voluntary mediation before the hearing. 34 C.F.R § 300.510. If the school district has not resolved the complaint within 30 days of the initial complaint, the hearing must commence. The hearing officer then must issue a decision within 45 days. *Id.* § 300.515(a). The hearing officer may grant specific extensions of time at the request of one of the parties. *Id.* § 300.515(c). If the state offers a State level review of the hearing officer's decision, it must be completed within 30 days of issuance of the challenged decision. *Id.* § 300.515(b). State education departments may provide for even tighter timelines. For example, Vermont limits due process hearings to two days, unless the hearing officer determines that more time is needed.[7] The short time frame forces parties to present their cases briefly and efficiently, and to get back to the business of educating the child relatively quickly.

While some due process proceedings do become unduly delayed, this is not the typical outcome. In fact, most due process complaints do not result in a fully adjudicated hearing, suggesting that the IDEA's encouragement of informal resolutions is largely successful. For example, according to U.S. Department of Education data, in 2013-14, only two due process complaints were fully adjudicated in Michigan, compared with 52 that were dismissed or withdrawn before the hearing was held or completed. Both hearings resulted in decisions within the regulatory timelines. In fact, of the 2,813 fully adjudicated IDEA due process hearings that occurred nationwide that year, over 87% resulted in decisions

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[7] Vermont Rule 2365.1.6.15(e).

within the regulatory timelines or an extended timeline granted by the hearing officer.[8] As in Michigan, the vast majority of due process complaints nationwide (11,222) were resolved without the need for a full blown hearing.[9]

IDEA's relative success with informal resolution contrasts sharply with federal civil rights litigation, where there are no specified timelines for issuing decisions, no mandatory resolution sessions, and final dispositions may take months, if not years. A review of civil rights complaints filed in federal district courts from 1990-2006 showed that the average time to conclude a case was 13.6 months.[10] If a case proceeds with average speed, a child will wait more than a full school year before the trial court makes it decision. This is far from the speedy relief that Petitioners and the U.S. government contend will be available by allowing parents to go directly to court.

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[8] The U.S. Department of Education monitors the states' compliance with IDEA timelines and requires states to improve when rates fall into an unacceptable range. 34 C.F.R. § 300.603.

[9] U.S. Department of Education, EDFacts: IDEA Part B Dispute Resolution Survey, 2013-14, *available at* www.ed.gov/programs/osepidea/618-data/static-tables /index.html.

[10] U.S. Department of Justice, Bureau of Justice Statistics, Special Report, Civil Rights Complaints in U.S. District Courts, 1990-2006, Table 8 (Aug. 2008), *available at* www.bjs.gov/content/pub/pdf/cvrusdc06.pdf.

2. Due Process Hearing Officers with Particularized Knowledge and Training in Special Education Law and Hearing Procedures Offer Important Benefits

The IDEA specifically requires that disputes adjudicated through due process hearings be decided by impartial state hearing officers who have particularized knowledge about the statute, its implementing regulations, and court interpretations. 20 U.S.C. § 1415(f)(3)(A); 34 C.F.R. § 300.511(c)(1)(ii). States often include additional qualifications for hearing officers, such as experience as an attorney or a professional serving children with disabilities, and proficiency in conducting contested hearings.[11] The U.S. Department of Education has directed state education agencies to ensure that hearing officers are sufficiently trained to meet the statutory requirements.[12] Numerous training opportunities

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[11] *See, e.g.*, Illinois State Board of Education, Special Education Due Process Hearing Officer Qualifications and Duties (requiring hearing officers to have "a working knowledge of special education and related services), *available at* www.isbe.net/spec-ed/pdfs/dp-hearing-officer-qual.pdf; Texas Education Agency, Division of Special Education, Hearing Officers: Qualifications and Job Requirements (requiring at least five years of active practice of law, with two years in the area of special education, disability law, administrative law or civil rights), *available at* http://ritter.tea.state.tex.us/commissioner/qualif.html.

[12] Assistance to States for the Education of Children with Disabilities and Preschool Grants of Children with Disabilities; Final Rule, 71 Fed. Reg. 46,540 at 46,705 (Aug. 14, 2006) (agency

and materials for such administrative hearing officers on subjects ranging from relevant federal and state legal authority, to case management, to hearing procedures are offered by state governments, educational institutions, and private consultants.[13] In addition to training requirements, states may put in place procedures to evaluate and certify special education hearing officers on a regular basis. *E.g.*, 8 VA. ADMIN. CODE § 20-81-210(D).

These competency requirements are especially important in ensuring that decisions about the appropriate education and services for a student with disabilities are being made by individuals with a thorough grounding not only in the intricacies of disability law but also in the complexities that affect delivery of services to students with disabilities. A due process hearing officer's specialized knowledge and experience help her adhere to the strict administrative timelines, exercise fairness and

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comments explaining changes in final rules from proposed regulations).

[13] *E.g.*, *15th National Academy for IDEA Administrative Law Judges and Hearings Officers*, Seattle University School of Law (July 12-15, 2016), https://law.seattleu.edu/continuing-legal-education/idea-academy; John Copenhaver, *Due Process Hearing Officer Manual*, Mountain Plains Regional Resource Center Utah State University (Revised 2007), http://www.directionservice.org/cadre/exemplar/artifacts/BIE-9%20DPHO%20manual.pdf; *NYSED Resources for Impartial Hearing Officers*, Office of Special Education of the New York State Education Department and Special Education Solutions, L.L.C., http://www.spedsolutionsgroup.com/index.html; *Hearing Officer Deskbook: A Reference for Virginia Hearing* Officers, Office of the Executive Secretary of the Supreme Court of Virginia (Revised Dec. 2013), http://www.courts.state.va.us/programs/ho/deskbook.pdf.

wisdom in applying more relaxed evidentiary standards, and work with the parents, attorneys, special education advocates, educational experts and other witnesses adeptly, ensuring that all the relevant facts have been adduced and that she reaches a reasoned, well supported decision. In the event a party aggrieved by the hearing officer's decision seeks review by a court, the judge has the benefit of a detailed factual record and legal rationale from a qualified hearing officer. The administrative record can help provide a court with a comprehensive understanding of the child's needs, the efforts the school district has or has not made to meet those needs, the basis for the parents' concerns, the reasons explaining the district's denial of parental requests, the resources available to provide needed services and a host of other factors that may have influenced the hearing officer's decision.[14]

Under Petitioners' approach, a court faced with what amounts to an educational decision is deprived of this crucial information. Even in cases where non-IDEA components must be resolved, the administrative process can shed light on how best to accommodate a child's need in the context of the educational setting.[15]

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[14] "The purpose of exhaustion is to 'enable[ ] the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.'" *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000) (quoting *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989)).

[15] This Court has often recognized the importance of educational considerations when determining the appropriate parameter of

3. IDEA Due Process Procedures Include Important Elements That Seek to Reduce the Burdens of Contested Hearings.

Petitioners' *amici* argue that IDEA due process proceedings are costly, burdensome impediments to families seeking relief for a school district's alleged denial of their rights under Section 504 and the ADA. To the extent this conclusory statement references costs in dollars, there is little, if any, definitive empirical evidence about the actual financial burdens imposed on parents by IDEA due process procedures relative to those associated with undertaking civil rights litigation. While research may not offer hard numbers to either substantiate or refute Petitioners' assertion from a comparative standpoint, it cannot be disputed that civil litigation can be an expensive proposition as well, sometimes dragging litigants through costly and extensive pre-trial discovery and numerous procedural hearings, running up costs for both sides before any consideration of the merits of a case even begins.

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students' rights under the Constitution and other federal laws. *E.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (student First Amendment free speech rights subject to restriction when disrupting school operations); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (student subject to search in absence of Fourth Amendment probable cause when school official has reasonable suspicion student has violated the law or school rules).

In contrast, federal and state IDEA regulations provide parents certain benefits aimed at easing the burdens that may be associated with contested hearings. These measures particularly benefit low income families in accessing the IDEA's due process system. First, the IDEA requires school districts to help parents find legal counsel by providing parents with information on any free or low cost legal or other relevant services, such as parent advocates, that may be available to assist them. 34 CFR § 300.507(b). The IDEA also eliminates the need for the parties to engage in extended discovery battles by requiring them to exchange all the evaluations and recommendations upon which they intend to rely, *id.* § 300.512(b); each party then has the right to prohibit the introduction of *any* evidence that has not been disclosed to it at least five days before the hearing. *Id.* § 300.512(a)(3).

In many jurisdictions, hearings may be conducted in a more relaxed and open manner than court proceedings. For instance, under many state administrative law frameworks, hearing officers are not constrained by judicial rules of evidence, allowing them to admit evidence that would be ruled inadmissible in courts,[16] and then to give it the appropriate weight necessary to arrive at findings of fact and recommendations of law. This flexibility benefits parents by affording them the opportunity to present testimony or evidence of untested or novel approaches to their child's education that might be

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[16] *E.g.*, CAL. CODE REGS. tit. 5, § 3082 (2016); MISS. ADMIN. CODE § 32-21: 4.3 (2016); NEV. ADMIN. CODE § 645.560 (2016); N.Y. COMP. CODES R. & REGS., tit. 19, § 400.8 (2016).

excluded under normal evidentiary rules. Relaxed administrative procedures may also reduce potential expenses for parents challenging a school district's determinations, by allowing qualified representatives, parent advocates, or even the parents themselves to appear on their own behalf without incurring the expense associated with legal counsel.[17] In such situations, the benefits of relaxed hearing rules often inures to the non-lawyer parent or advocate who may actually receive substantial assistance from a hearing officer in entering on the record as much information as possible.[18] Thus, the administrative hearing process makes it possible for parents to engage in an impartial process for resolution of their claims without necessarily requiring parents to expend funds associated with a full blown federal trial. Finally, if parents prevail at the administrative hearing stage, the need for court proceedings is averted, and parents are entitled to recover their attorneys' fees, just as they would were

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[17] *E.g.*, MISS. ADMIN. CODE § 7-4-1: 300.512 (2016); 19 TEX. ADMIN. CODE § 89.1175 (2016).

[18] *See generally*, Jim Gerl, *Bench Skills for Hearing Officials: Conduct and Control of Administrative Hearings*, Presentation at the Annual Conference of the National Association of Hearing Officials November 16 -19, 2014, *22, http://todaycms.s3.amazonaws.com/naho/00/cd38f05bc211e48fab03cef238b12c/Conduct-and-Control-of-Admin-Hearings.pdf ("Particularly where a party is not represented by counsel (such parties are sometimes referred to as 'pro se' parties), the hearing officer has a duty to develop a complete record (citing *Board of Educ. of Victor Central Sch. Dist.*, 27 IDELR 1159 (SEA NY 1998); *Salisbury Township Sch. Dist.*, 26 IDELR 919 (SEA PA 1997); *LBDE Pub. Schs. v Massachusetts Bureau of Special Educ. Appeals*, 59 IDELR 284 (D. Mass. 2012)).

they to succeed in court on claims under Section 504 or the ADA. 20 U.S.C. § 1415(i)(3)(B)-(G).

It is true that the monetary, emotional and relational costs of due process proceedings can escalate for both parents and school districts, particularly when the issues are difficult and the dispute becomes contentious, leading the parties to change their posture from cooperative to adversarial. Much concern has been expressed by schools and disability advocates alike about this unfortunate phenomenon, sometimes called the "judicialization"[19] of IDEA administrative proceedings.[20] This is a departure from congressional intent; indeed, comparable concerns raised in the past led Congress to amend the IDEA to include additional measures, such as mandatory resolution sessions, aimed at encouraging on-going dialog between the parties and opportunities to work out differences before proceeding to a due process hearing; but Congress did not abandon or retreat from due process hearings as the preferred model for schools and parents to engage in formal dispute resolution. Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004).

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[19] The label itself is telling: the more IDEA administrative proceedings mimic court proceedings, the more they are viewed as problematic.

[20] *E.g.*, Perry A. Zirkel and Zorka Karanxha, *Creeping Judicialization In Special Education Hearings?: An Exploratory Study*, University of South Florida Scholar Commons (July 2007), *available at* http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1038&context=els_facpub; Tracy G. Mueller, *Alternative Dispute Resolution: A New Agenda for Special Education Policy*, 20 J. OF DISABILITY POL. STUDIES 4-13 (2009).

Similarly, many of the currently proposed solutions, such as facilitated IEP meetings,[21] focus on maximizing the likelihood that parents and schools will reach early agreement on appropriate services for students with disabilities, thereby reducing the need for any formal dispute resolution whether through administrative or court proceedings. In short, to the extent that IDEA administrative proceedings are costly and contentious as a result of their increasing judicialization, it makes little sense to give parents direct access to court to obtain relief readily available under the IDEA.

Petitioners advocate an open path to court as a means to strengthen the ability of families with disabled children to exercise their rights to equal access to educational opportunities. But their purported cure for the ills of IDEA administrative procedures, in fact, produces some equity concerns. As discussed above, the IDEA process, even with its imperfections, provides a relatively level playing field for both families with means and low income families by using more informal rules and practices that can assist parents in securing changes to an IEP without the aid of an attorney. In contrast, federal civil litigation is a proposition open principally to parents who can afford a lawyer able to guide them through

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[21] *E.g.*, Julie Gentili Armbrust, *IEP Facilitation: Tips of the Trade*, Mediation Northwest (Oct. 1, 2010), *available at* http://www.ode.state.or.us/wma/teachlearn/conferencematerials/sped/2010/iepfacilitationtraining.pdf; *Facilitated Individualized Education Program (FIEP) Procedures: A Guide for Families and Districts*, Office of Special Education West Virginia Department of Education (Aug. 2015), *available at* http://wvde.state.wv.us/osp/compliance/documents/fiep_procedures_guide.pdf.

its complexities. In this way, Petitioners' reading of the exhaustion requirement risks advantaging wealthier families by granting them greater negotiating power through the threat of litigation and a larger share of educational funds expended on litigation or services that benefit only one child. Requiring everyone seeking changes to their child's IEP to first use the IDEA's more accessible and informal procedures benefits all families by promoting a more equitable remedial scheme.

CONCLUSION

Petitioners' position, rather than increasing protection of the rights of students with disabilities, could have consequences that harm more than help. Weakening the IDEA's exhaustion requirement would unnecessarily distort the focus of the collaborative framework and undermine the effectiveness of the procedural safeguards that Congress carefully crafted to facilitate agreement between parents and school on appropriate services to meet the educational needs of children with disabilities. We urge the Court to eschew a decision here that would encourage more "[l]itigation [that] is expensive, time-consuming, and emotionally draining." *Brown v. TD Bank, N.A.*, 2016 WL 1298973, *7 (E.D. Pa. Apr. 4, 2016). Litigation inflicts relational costs that render parents and schools unable to form or maintain the constructive and supportive interaction necessary to the continuing educational well-being of the child at the center of the dispute. It misdirects school districts' already strained financial and operational resources away from serving all children and into wasteful

expenditures on legal costs. Because of these long-lasting and damaging effects, *Amici* urge this Court to affirm the Sixth Circuit's decision.

Respectfully submitted,

Francisco M. Negrón, Jr.
Naomi E. Gittins
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St
Alexandria, VA 22314
(703)838-6722

Thomas B. Allen
Counsel of Record
W. Joseph Scholler
Alexander L. Ewing
Jack B. Hemenway II
FROST BROWN TODD LLC
9277 Centre Pointe Dr., Suite 300
West Chester, Ohio 45069
(513)870-8200
tallen@fbtlaw.com

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OFFICE OF THE CLERK

No. 15-497

In The
Supreme Court of the United States

STACY FRY, et vir, as Next Friends of Minor E.F.,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PSYCHIATRIC SERVICE DOG PARTNERS, INC.; NORTH STAR FOUNDATION, INC.; TADSAW, INC.; AND K9 RESOURCES LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN J. ENSMINGER, ESQ.
Counsel of Record
4428 Atwood Road
PO Box 675
Stone Ridge, NY 12484
(917) 613-4960
jensminger@msn.com

Attorney for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the IDEA.

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INTEREST OF *AMICI CURIAE*[1]

Psychiatric Service Dog Partners, Inc. is a South Carolina nonprofit corporation promoting the mental health of people using service dogs for psychiatric disabilities by educating, advocating, providing expertise, facilitating peer support, and promoting responsible service dog training and handling. The organization works for legislative and regulatory change on issues involving service animals and is a participant on an advisory committee established by the Department of Transportation to consider revisions to airline access rules for individuals using service and support animals.

TADSAW, Inc. is a Texas nonprofit corporation that trains a medical alert service dog for any wounded Veteran Service Member (Active Duty, Retired, or Discharged), and members of their immediate families, surviving with Military Induced Anxiety Depression Syndrome (MIADS), Post-Traumatic Stress Disorder (PTSD), Military Sexual Trauma (MST) or Traumatic Brain Injury (TBI) in order to restore and improve their Quality of Life with a canine 'Battle Buddy.' Since July 2010, TADSAW has accredited almost 600 Service Dog Teams. TADSAW, Inc. provides educational assistance to businesses, offices, and governmental agencies

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[1] Pursuant to this Court's Rule 37.3(a), the parties have given blanket written consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

on acceptable etiquette and interaction of employees and clients in the treatment of persons with service dogs.

North Star Foundation is a Connecticut nonprofit corporation that breeds, trains, and places service dogs for children who face social, emotional, or educational challenges. North Star has created over 250 service dog teams for children with special needs, with over half going to children on the autism spectrum. North Star also works with schools to raise awareness about service dogs in general, as well as to inform school personnel about the specific purposes of North Star dogs that accompany their children with special needs to the classroom.

K9 Resources LLC is an Ohio Limited Liability Company that trains law enforcement canines and other specialized dogs, including approximately 85 service dogs for individuals with disabilities. The company also trains local, state and federal officials, as well as school administrators and teachers, regarding the functions that trained dogs can perform for children, including children with disabilities, and how the proficiency of the dogs in performing their tasks is best maintained.

Amici differ in the types of dogs they train or help others to train and use, but are all concerned with removing barriers encountered by users of service dogs in society, including in public schools and other educational settings. They are concerned that the process by which a child with special needs adapts to and begins

to work with a service dog with medical or prosthetic functions should not be delayed because school personnel are unfamiliar with such trained dogs and need a protracted learning curve of their own in order to determine how to accommodate such complicated and living assistants. *Amici* believe that affirmance of the courts below in the present matter will encourage certain schools and school systems to throw up unnecessary procedural barriers to the admission of service animals used by children with special needs. They are also concerned that affirmance would give schools a reason not to revise outdated policies that recognize only specific types of dogs, such as guide dogs and signal dogs, because such policies fail to take into account certain present and developing types of service animals that are trained to perform work or tasks directly related to an individual's disability.

SUMMARY OF THE ARGUMENT

After E.F. attended kindergarten for one day in October 2009 with her trained service dog named Wonder, the principal of the Ezra Eby Elementary School told her parents that Wonder could not come back with E.F. Beginning in December 2009, however, the parents began to take E.F. to school accompanied with Wonder, her trained service dog. At a meeting on January 7, 2010, the Frys agreed to mediation to resolve the issues regarding Wonder's coming to school with E.F. Having received a letter from one of E.F.'s treating physicians and another letter signed by a physical

therapist and a speech language pathologist that were treating E.F. outside of school, the school district agreed on March 22, 2010, that E.F. could come to school with Wonder on a 30-day trial basis. This period was extended to the end of the school year.

During the trial period, school staff recorded what they considered to be deficiencies in Wonder's behavior. Wonder was generally separated from E.F., both in the classroom and for many school activities, often remaining at the back of the classroom with E.F.'s mother, who came as a handler. Thus, the school did not use the period to gain a better understanding of the service dog and his functions and the benefits he was providing to E.F., but rather to gather evidence that could justify excluding Wonder in the future. At the end of the school year, Petitioners were advised that Wonder would not be permitted to accompany E.F. when first grade began in the fall. Petitioners began homeschooling E.F. and filed a complaint with the Office for Civil Rights in the Department of Education (OCR).

After two years, the complaint with OCR was resolved in favor of the position of Petitioners when OCR concluded that the school district "should have modified [its] policies and practices to permit the service animal to accompany and assist the Student through the school day. . . ." Office for Civil Rights, U.S. Dept. of Ed., OCR Docket #15-10-1268 and #15-10-1269 (Appendix A to complaint of Plaintiffs/Petitioners, filed Dec. 17, 2012, 2:12-cv-15507-LPZ-DRG), Sup. Ct. Docket No.

15-497 Joint Appendix, JA 16, 34 (Aug. 22, 2016) (hereinafter "OCR Report"). Although Respondents entered into an agreement with OCR in April 2012 under which Wonder could return with E.F. to the school, Respondents nevertheless did not agree with the factual or legal conclusions of the OCR Report. Office for Civil Rights, U.S. Dept. of Ed., Resolution Agreement: Napoleon Community Schools, OCR Docket #15-10-1268, Sup.Ct. Docket No. 15-497 Joint Appendix JA 43 (Apr. 26, 2012) (hereinafter "Resolution Agreement").

Sensing Wonder would be unwelcome despite the agreement, Petitioners applied to "a school in a different district where they encountered no opposition to Wonder attending school with E.F." *Fry v. Napoleon Community Schools*, 788 F.3d 622, 624 (6th Cir. 2015) (hereinafter "*Fry*"). Petitioners then filed a claim in federal district court for damages and other relief under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (ADA), and a state law claim. Respondents answered that the action should be dismissed because the Frys had not exhausted administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA). The complaint was dismissed by the district court. *EF ex rel. Fry v. Napoleon Community Schools*, No. 12-15507, 2014 WL 106624 (E.D. Mich. Jan. 10, 2014) (hereinafter "*EF*"), which was affirmed by a panel majority in the Sixth Circuit. *Fry*, 788 F.3d at 631.

Petitioners did not pursue administrative remedies under the IDEA at the end of the spring term in 2010 because they were not seeking to alter E.F.'s Individualized Education Program (IEP) but rather were seeking to enforce her rights under the ADA and the Rehabilitation Act, for which OCR was a more appropriate authority. Nor did they pursue administrative remedies after the OCR Report was issued in May 2012, which would have been pointless as they enrolled her in a different school.

Further administrative remedies should not have been required because (1) Wonder's functions are not educational in nature, but rather are assistive to E.F.'s mobility in all environments including schools and Respondents' educational system should not be able to countermand or interfere with medical and physical therapy determinations as to the best way for E.F. to achieve maximum independence, making insistence that such remedies be pursued a deprivation of her rights under the ADA and the Rehabilitation Act; (2) pursuing the remedies suggested by Respondents would have led to further separation of E.F. from Wonder at a time when the development of a bond between them was crucial to E.F. being able to use Wonder as a living, sentient assistant, both because of her own need to continue working with Wonder and Wonder's need to maintain his training by working with E.F. in school, one of the environments in which she needed his assistance; and (3) the school would not have insisted on exhaustion of administrative remedies had E.F. been blind or had a visual impairment and needed a guide dog because school policy automatically accepted such

a dog, making the imposing of different requirements and additional administrative procedures for other types of service animals a violation of the ADA and the Rehabilitation Act.

The district court and the Sixth Circuit majority expressed concern that parents of children with disabilities might be strategically trying to avoid exhaustion requirements under the IDEA by not alleging violations of the IDEA or by seeking relief not available under the IDEA. *EF*, 2014 WL 106624 at *3-*5; *Fry*, 788 F.3d at 626. This, however, fails to consider that schools and school systems might also be looking at such disputes strategically when insisting on sequential and pointless administrative remedies being conducted by officials who have collectively determined that a service animal should be kept out of a school. Thus, failure to reverse the decision of the Sixth Circuit will provide a means by which school systems reluctant to admit service dogs may significantly delay their acceptance. Such delays can impede formation of the bond that must develop between a service dog and a child who needs the dog to achieve a maximum level of independence in life. Affirmance of the Sixth Circuit will also effectively permit school districts with policies recognizing only guide dogs or certain limited types of service dogs as legitimate service animals to continue such restrictive policies until a dispute arises.

Amici submit that the question now presented to the Court should be answered in the negative, i.e., that exhaustion of administrative remedies under the IDEA should not be required before a suit for damages

can be instituted under the ADA and the Rehabilitation Act. As to a medically prescribed and dignity-providing service dog, there should be no exhaustion requirement since any mention of a service animal in the IEP of the child is for informational purposes of school staff and does not give the student or her parents a claim for relief under the IDEA.

ARGUMENT

I. PETITIONERS' DOG IS A SERVICE ANIMAL WHOSE MOBILITY ASSISTANCE FUNCTIONS ARE NONEDUCATIONAL IN NATURE AND PROVIDE A CHILD WITH CEREBRAL PALSY THE OPPORTUNITY TO DEVELOP MAXIMUM INDEPENDENCE BOTH INSIDE AND OUTSIDE OF SCHOOL AND WITH GREATER DIGNITY THAN IS POSSIBLE WITH A HUMAN AIDE.

Judge Daughtrey, dissenting in the Sixth Circuit, correctly observes that the claim of the Frys was not educational in nature so "the IDEA's exhaustion provision was improperly invoked by the district court." *Fry*, 788 F.3d at 631. Judge Daughtrey also states that even if the accommodation sought could be considered educational, "the fact that school policy would permit a 'guide dog' on campus, but not a certified 'service dog,' suggests why an attempt at exhaustion of administrative remedies would be futile in this case and should be excused." *Fry*, 788 F.3d at 631-32. Wonder's functions

were not education-related but were rather those of disability mitigation, involving behavioral synchronization and spatial cooperation between service dog and master, as is the case with a guide dog. In maintaining a policy under which guide dogs are allowed to accompany students with visual impairments but a non-guide service dog, trained as a mobility impairment dog, was not allowed to accompany a student afflicted with spastic cerebral palsy, Respondents were illegally distinguishing between types of disabilities.

A. Wonder is a medically prescribed and certified service dog trained to assist a child with motor and mobility impairments.

The Department of Justice first issued comprehensive and detailed regulations regarding service animals in 1991, which were significantly revised in 2010,[2]

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[2] In applying the service animal regulations to public entities in 2010 (effective March 15, 2011), the Department of Justice stated:

> Although there is no specific language in the 1991 title II regulation concerning service animals, title II entities have the same legal obligation as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service program, or activity.

Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,191 (2010). For a discussion as to how the Title II regulations conformed to prior

with a small but important revision in 2011.[3] Title II regulations of the ADA define a service animal as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." The definition also provides examples of "work or tasks" that a service animal may perform, including "pulling a wheelchair, . . . retrieving items such as medicine or the telephone, [and] providing physical support and assistance with balance and stability to individuals with mobility disabilities. . . ." 28 C.F.R. § 35.104 (2015). The OCR Report states:

> [T]he [Frys] provided the [school and the school district] with documentation of the service animal's training, including a list of tasks the service animal had been trained to perform for the Student, as well as the handler and service animal training certificates. In addition, the Complainant provided the District with letters from the Student's treating physicians supporting the Student's need for

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policy statements of the Department of Justice regarding state and local entities, see Rebecca J. Huss, *Canines in the Classroom Revisited: Recent Developments Relating to Students' Utilization of Service Animals at Primary and Secondary Educational Institutions*, 9 Alb. Gov. L. Rev. 1, 6-7 (2016).

[3] Nondiscrimination on the Basis of Disability in State and Local Government Services: Corrections, 76 Fed. Reg. 13,285-86 (2011), specifying that the work or tasks performed by a service animal "must be directly related to the individual's disability." The wording in the 2010 release had specified that the direct relationship between the animal's work or tasks had to be the *handler's* disability, but it was realized that with some service dogs, such as autism service dogs, the handler may be a parent or aide.

> the service animal, which stated that the service animal would increase the Student's independence, that the service animal should be permitted to assist the Student with mobility and transition, and that the service animal would assist the Student in developing more independent motor skills.

OCR Report at JA 21-22. The service dog used by E.F. was trained to help her by picking up dropped items,[4] assisting her to transfer to and from a toilet, stabilizing her while she transitioned to and from her walker, assisting with directional control of her walker, serving as a bridge for transitioning from her walker to a standing or seated position at a table, improving her sitting balance by providing posterior support, and helping her to bridge social barriers. *Fry*, 788 F.3d at 624, 628, 637. These are functions of a mobility impairment dog and are not educational in nature, but rather reflect the fact that Wonder is in significant part an assistive technology to E.F., as is her wheelchair, both of which improve her mobility in every environment in which she lives.[5] Individuals with such conditions may

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[4] See Mary M. Camp, *The Use of Service Dogs as an Adaptive Strategy: A Qualitative Study*, American Journal of Occupational Therapy 509, 512 (2001) ("By far, the most common task that participants used their service dogs for was to retrieve dropped items."). She refers to service dogs as "the ultimate assistive technology." *Id.* at 516.

[5] For a discussion of the tasks that mobility impairment dogs can perform, see Jan Shubert, *Dogs and Human/Mental Health: From the Pleasure of Their Company to the Benefits of Their Assistance*, 2012 U.S. Army Med. Dept. J. 21 (2012).

use this combination of technologies throughout their lives.[6]

A school should not be able to refuse admission to any service dog that will do work or perform tasks in a school environment for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability, unless the dog is out of control or not housebroken, or would fundamentally alter the environment. 28 C.F.R. § 35.136(b) (2015); 28 C.F.R. § 35.130(b)(7) (2015). There will be instances where school personnel need to understand the dog's function so that responsibilities of teachers and aides may be adjusted, but the learning curve of the staff is not a reason for delaying or limiting a child's use of a service animal. As stated by a California district court, "the question is not whether Eddy [an autism service dog] will improve Plaintiff's educational progress, but whether Eddy will fundamentally alter Defendants' educational program." *C.C. v. Cypress Sch. Dist.*, No. 11-352, 2011 U.S. Dist. LEXIS 88287 (C.D. Cal. 2011) (granting preliminary injunction requiring school district to accommodate child's service dog in school). Thus, for E.F., any mention of a

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[6] Diana H. Rintala et al., *The Effects of Service Dogs on the Lives of Persons with Mobility Impairments: A Pre-Post Study Design*, 2002:15(2) Am. Assoc. of Spinal Cord Injury Practitioners and Social Workers 65, 70 (2002) (available at http://www.academyscipro.org/Public/PSWJournal.aspx), states that by 1996 there were more than 2,500 service dogs assisting people with physical impairments, but that because of demand, waiting lists are long and applicants have to wait one to two years or longer to obtain such a dog.

service dog in her IEP should have been regarded by Respondents as solely informational so school staff can prepare and adapt as needed to accept the service dog.

B. None of the functions Wonder was trained to perform were intended to alter the educational experience of E.F. and those functions were not within the expertise, or apparently understood by, the administration of Napoleon Community Schools.

The functions of E.F.'s service dog should not have been subject to removal, even temporarily, by school officials. The OCR Report notes that E.F.'s "cerebral palsy . . . significantly limits her motor skills and mobility but does not impact her cognitively." OCR Report at JA 19. Judge Daughtrey correctly observes that a school system's expert determination about technical educational issues might "concern whether speech therapy would help a child struggling with autism to communicate," but "it would *not* concern . . . whether a blind child should be furnished with a guide dog or outfitted with a white cane; or whether a crippled child should be confined to a wheelchair or encouraged to use a walker *assisted in balance and navigation by a service dog*." *Fry*, 788 F.3d at 636. Judge Daughtrey adds that "for [E.F.], Wonder functions as an access ramp – not just in terms of the school building but, more significantly, in all aspects of her life." *Fry*, 788

F.3d at 633. The presence of a service dog was not necessary to enhance E.F.'s "educational opportunities," as suggested by the majority and properly criticized by the dissent. *Fry*, 788 F.3d at 631, 634.

By refusing to allow E.F. to use her service dog in school, Respondents were limiting her ability to function as normally as possible in the school environment, as she does in other times and places. As stated by a California district court 26 years ago in another case involving a child with cerebral palsy who had a dog trained to give her greater independence by increasing her mobility:

> [P]laintiff has chosen to use a service dog to increase her physical independence and to decrease her need to rely on others to perform tasks that are beyond her own physical capacity. The choice to employ a service dog for these purposes is akin to choosing to use a wheel-chair to increase her mobility rather than a pair of crutches. By excluding her service dog, defendants have asked plaintiff to assume a different persona while she attends school, i.e., the persona of a disabled person without a service dog. In this basic sense, the effect of defendants' decision to deny entrance to the service dog is to exclude the person who exists everywhere but in school, i.e., a disabled person with a service dog, from participation in the educational program as well.

Sullivan v. Vallejo City Unified Sch. Dist., 731 F.Supp. 947, 958 (E.D. Cal. 1990). School district officials apparently even believed a service dog and a human aide

as mutually exclusive as Judge Daughtrey notes that "they threatened to eliminate the human aide from the child's IEP if her parents insisted on having Wonder accompany [E.F.] in school." *Fry*, 788 F.3d at 632.

C. The school should not be able to exclude a service dog that allows the performance of tasks such as moving on and off a toilet with greater dignity than can be achieved with any human assistance.

As stated in the Sixth Circuit decision, "in January 2010, school administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide." *Fry*, 788 F.3d at 624. That the school officials did not understand the independence value of the service dog to E.F. is underscored by an incident described in the OCR Report, stating that "Respondents required that [E.F] demonstrate her use of the service animal while using the toilet, with the stall door open and four adults observing, which embarrassed her." OCR Report at JA 27.

Studies have found that individuals with disabilities feel more independent with service dogs than they do when dependent on assistance of other individuals, either professionals or family members. Mai Shintani et al., *The Effect of Service Dogs on the Improvement of Health-Related Quality of Life*, 64(2) Acta Med. Okayama 109, 112 (2010), surveying service dog owners

who had spinal and other physical injuries with other individuals with similar injuries but without service dogs, found "that service dog owners feel a decrease in physical and mental burdens in daily activities, which contributes not only to their improved QOL [quality of life], but also to the possibility of independence and social participation." Bonnie Mader et al., *Social Acknowledgments for Children with Disabilities: Effects of Service Dogs*, 60(6) Child Development 1529 (1989), find that service dogs "serve as an antidote for social ostracism." This team compiled statistical evidence that people encountering children in wheelchairs were significantly more likely to smile, to give friendly glances, and to institute conversations if the children were accompanied by service dogs than if they were not. (See Appendix A herein for further discussion of and figures from this research.)

Mary M. Camp, *The Use of Service Dogs as an Adaptive Strategy: A Qualitative Study*, 55 American Journal of Occupational Therapy 509, 515 (2001), in a study of mobility service dog users, found that "[f]or all participants, the meaning of having a service dog seemed to be connected with [a] shift of focus away from their disabilities and onto their abilities to accomplish tasks independently using their dogs." Clinton R. Sanders, *The Impact of Guide Dogs on the Identity of People with Visual Impairments*, 13(3) Anthrozoos 131, 134 (2000), notes that "dog-assisted independence" gives users of guide dogs "a feeling of wholeness. . . ." One user said to Sanders: "With a dog you are whole. You are not two people trying to function together,

you're one unit. Even though you are two bodies it doesn't feel that way." *Id.* "[T]he dog is transformed into a literal extension of the owner's self. . . ." *Id.* at 136.

> This intimate partnership, this merger of two into one, transformed their definitions of themselves and, because of the way it shaped their social encounters, enhanced their identities in the public eye. No longer helpless, they were competent and able to move with confidence and grace. They could now live . . . "a life without fear."

Id. Respondents, rather than demonstrating any expertise on the value of the service dog to E.F., consistently denied his abilities and refused to allow him to accompany E.F. except briefly while E.F. was in kindergarten.

D. The general social effects of having a service dog would exist both in non-educational and educational environments and do not reflect an educational function.

The Sixth Circuit decision notes that the Frys described social and psychological benefits coming from E.F.'s collaboration with Wonder:

> The Frys characterize Wonder's independent value to E.F. as assistance with specific physical tasks, enabling her "to develop independence and confidence," and helping her "to bridge social barriers." Thus if the human

> aide was not a sufficient accommodation relative to Wonder, that was because he or she did not increase E.F.'s ability to perform physical tasks and function confidently and independently outside of school. One might also infer, though the Frys do not allege it directly, that relying on only a human aide without the additional presence of a service dog would inhibit E.F.'s sense of confidence and independence, as well as her ability to overcome social barriers, *in* school.

Fry, 788 F.3d at 628.

Thus, the benefits that Wonder provides to E.F. at all times every day were seen by the panel majority as giving the school educational authority over the use of the dog because those benefits also could be identified as occurring *in* school. The majority is aware that skills developed in school have significance outside of school: "Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be." *Id.* Although acknowledging the benefit of a wheelchair, it is highly doubtful the majority would suggest that the benefit of a wheelchair outside of school was sufficient for a child's needs so that the school could be given authority to deny use of the wheelchair inside the school. Indeed, a mobility impairment dog is in significant part an assistive device to an individual with motor and mobility disabilities, and the majority was essentially allowing the school to delay and perhaps prohibit use of that device in school.

The majority notes that a child's "confidence and social experience at school . . . fall under the scope of factors considered under IDEA procedures." *Id.* Thus, the logic appears to be that the pediatrician's prescription of a service dog, and the family's fundraising to have the dog trained by a professional service dog training facility to serve their daughter's needs, could be ignored by the school because the school also hoped the child would become confident and develop social abilities. Wonder's effect in bridging social barriers, as explained in Appendix A, is not a task but rather an inevitable result of an individual's being accompanied by a service animal in public settings, and is accomplished by the mere existence of a trained and calmly disposed service dog. Mary M. Camp *supra*, at 510, argues that the "socializing effect of service dog ownership . . . may help to counteract the documented social barriers often experienced by persons with disabilities. . . ." She elaborates that "[u]nlike owning a wheelchair or electronic aid, owning a dog is an experience that is familiar to persons with or without disabilities. In this way, service dogs provide common ground, bridging the differences that may cause social isolation and facilitating a renewed sense of connection with others." *Id.* at 516.

Users of wheelchairs who have service dogs also go more places and cover more distance daily on average than users of wheelchairs who do not have service dogs. Robert Wesley Milan, Quality of Life of Service Dog Partners (unpublished Ms. thesis, University of Pittsburgh, available at http://d-scholarship.pitt.edu/6621/)

(2007), compared wheelchair users who had service dogs with wheelchair users who did not have service dogs on a number of scales. Milan found, defining mobility as an "individual's ability to move about effectively in his/her surroundings," that mobility scores were significantly higher for the service dog group. This was true even though the service dog group "had significantly more individuals with severe and progressive disabilities. . . ." *Id.* at 48.

II. RESPONDENTS' PERSISTENT REFUSAL TO ALLOW WONDER TO ACCOMPANY E.F. TO SCHOOL AND THE CONTINUAL REJECTION OF WONDER AS A SERVICE ANIMAL INDICATE THAT RESPONDENTS SAW PROLONGED ADMINISTRATIVE PROCEDURES AS A MEANS OF AT LEAST DELAYING ACCEPTANCE OF WONDER INTO THE SCHOOL, AND ALSO INDICATE THAT RESPONDENTS FAILED TO UNDERSTAND THE NECESSITY OF E.F. AND WONDER DEVELOPING A BOND SO THAT THEY COULD FUNCTION TOGETHER AS EFFECTIVELY AND QUICKLY AS POSSIBLE.

Respondents first refused to allow Wonder to accompany E.F. to kindergarten after the first day E.F. attended school with the dog in October 2009, then seemingly relented during a two-month "trial period" from April 12 to June 11, 2010, during which Wonder was largely separated from E.F. Respondents resumed and maintained their refusal to admit Wonder during the two years the Frys home-schooled E.F. while OCR

conducted its investigation. Upon OCR concluding its investigation in May 2012, Respondents agreed to accept Wonder but continued to dispute OCR's findings. Resolution Agreement at JA 43. Unsurprisingly E.F.'s parents chose to enroll her in a different school.[7] Thus, despite nearly continuous opposition to Wonder for two and a half years from October 2009 until May 2012, Respondents argue that they and the Michigan school system needed more hearings and more time.

A. Although the school permitted E.F. to be accompanied by Wonder during a two-month "trial period" at the end of the kindergarten school year, the purpose of the period from the school's perspective appears not to have been to understand how E.F. and Wonder work together but rather to give school personnel time to amass a list of difficulties associated with complying with federal law allowing Wonder's presence in the school.

During the two-month trial period in 2010, the OCR Report states that "the service animal became confused about whom to assist when the service animal and the handler were repeatedly made to sit in the

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[7] Other parents in the same situation have preferred to send their children to schools more accepting of the use of service animals. See, e.g., *Hughes v. Dist. Sch. Bd. of Collier County*, No. 2:06-cv-629-FtM-29DNF, 2008 WL 4709325, 2008 U.S. Dist. LEXIS 110804 (M.D. Fla. 2007).

back of the classroom away from the Student. . . ." OCR Report at JA 36. Wonder was not permitted to assist E.F. outside the classroom either:

> Based on Recipient [Napoleon Community Schools] records, OCR learned that, during the trial period, the Recipients prohibited the Student from participating in school-related activities such as a school play, "Relay for Life," and "field day" with the service animal. Recipient records revealed that the Recipients also prohibited the service animal from accompanying and assisting the Student during recess, lunch, computer lab, library activities, and other specials, and prohibited the service animal from assisting the Student during the provision of therapy services. Furthermore, according to letters, handwritten notes, and emails that the Recipients submitted to OCR, the Recipients forbade the use of the service animal for certain tasks that the service animal had been specifically trained to do, such as assisting the Student with toileting.

OCR Report at JA 27. Thus, even though Wonder was sometimes in the same room as E.F. during the trial period, he was often prohibited from being close enough to her to perform the tasks he had learned. The purpose of the trial period was in fact to allow the school to record evidence that its officials either regarded as proving that Wonder was not adequately trained or was not functioning as a service animal:

> According to a letter the Recipients' attorney submitted to OCR on November 5, 2010, as

> well as other documents submit[illegible] by the Recipients, the express purpose of the trial period was to allow them time to evaluate and further observe the service animal, as well as the third-party handler (i.e., the Complainant [Stacy Fry]), in the school setting. During the trial period, records kept by District staff who observed the service animal during the trial period contain detailed notes of each time: the service animal required more than one command or attempt to complete a task, because the service animal did not successfully complete the task on the first try; the handler read a book or magazine, took notes, typed on her cell phone, said anything to or responded to a staff person or another student, or left the room to take her other child to his classroom before the bell rang; the Student did not use the service animal when she could have used the service animal; or the Student made a face or seemed displeased when something the service animal retrieved for her had slobber on it.

OCR Report at JA 26-7. Thus, Wonder was often behind the class with E.F.'s mother, whose interactions with the dog were carefully watched for any violation of classroom decorum, including Stacy Fry dealing with her other child in the school. It does not seem to have occurred to the school that forcing the dog to be with the mother could have resulted in a "likely estrangement from" E.F. due to "an increased attachment with" Stacy Fry, taking phrases from *A.S. ex rel. Leonel S. v. Catawba County Board of Education*, No.

5:11-CV-27, 2011 WL 3438881 at *6 (W.D.N.C. Aug. 5, 2011).[8]

Recording instances where E.F. "made a face" because of something Wonder did would suggest that the school did not see the bonding between the service dog and the child as capable of having any elements of a companion relationship or that such a relationship can contain elements of humor.[9] Observers also recorded one occasion where Wonder barked at "two boys roughhousing," and another when he growled, though in both instances Wonder remained under the handler's control. OCR Report at JA 28. As noted by an Illinois court, the state's definition of a service animal "does not specify service animals must behave perfectly at all times." *K.D. v. Villa Grove Community Unit School District No. 302 Board of Education*, 403 Ill.App.3d 1062, 936 N.E.2d 690, 699 (Ill. App. Ct. 2010). Anna

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[8] The triadic relationship of child, service dog, and parent has been studied particularly with children who have autism where the parent has to serve as a handler while the child must nevertheless develop a bond with the service dog. See Kristen E. Burrows et al., *Sentinels of Safety: Service Dogs Ensure Safety and Enhance Freedom and Well-Being for Families with Autistic Children*, 18(12) Qualitative Health Research 1642, 1646 (2008). With E.F., on the other hand, Wonder was responsive to E.F.'s verbal commands and it was hoped that, as E.F. developed motor skills, she would be the dog's sole handler. *Fry*, 788 F.3d at 624; OCR Report at JA 21.

[9] Francois Martin and Jennifer Farnum. *Animal-Assisted Therapy for Children with Pervasive Developmental Disorders*, 24(6) Western J. of Nursing Res. 657, 667 (2002), find that children with pervasive developmental disorders, as with most children, are more playful in the presence of a dog. Perhaps the school saw this as contrary to the educational environment.

Chur-Hansen et al. *The Experience of Being a Guide Dog Puppy Raiser Volunteer: A Longitudinal Qualitative Case Study*, 5 Animals 1 (2014), notes that even well-trained guide dogs do "not always manage to hold their attention to their tasks," and can become distracted.[10]

B. The school's separation of Wonder and E.F. during much of the trial period, and the refusal to allow Wonder into the school after that period had Petitioners continued to send E.F. to the school, controverted the very purpose of an assistance dog and threatened the daily development and enhancement of a bond between the child and the service dog.

The Sixth Circuit decision recognizes that there was a difference between having Wonder work with E.F. and having an aide work with her:

> If the human aide was not a sufficient accommodation, it was because he or she did not help E.F. learn to function independently as effectively as Wonder would have and perhaps because he or she was not as conducive to E.F.'s participating confidently in school activities as Wonder would have been. The complaint does not allege that the human aide

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[10] Play time is very important to service dogs, which are often selected from breeds known for playfulness. See Sabrina Hauser et al. *Understanding Guide Dog Team Interactions: Design Opportunities to Support Work and Play*, Proceedings of the 2014 Conference on Designing Interactive Systems 1 (2014).

> was less effective than Wonder would have been in providing immediate physical assistance. . . .

Fry, 788 F.3d at 627. This is of course the point of having a service animal. Although an aide can pick up a dropped pencil or help a child move from a wheelchair to a toilet,[11] perhaps with less effort for the child than must be made with a dog, the child feels more independent with the dog than with the aide. The majority then argues:

> Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal . . . [which] falls squarely under the IDEA's purpose of "ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Thus developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" used to set goals in E.F.'s IEP.

Fry, 788 F.3d at 628. The logic appears to be that the school, having for nearly a year refused to accept the

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[11] Stacey K. Fairman and Ruth A. Huebner, *Service Dogs: A Compensatory Resource to Improve Function*, 13(2) Occupational Therapy in Health Care 41 (2000), found that 17.8% of users receiving service dogs from a broad-based training organization received assistance from their dogs in "toileting."

dog as a service dog or to acknowledge his benefits, should be allowed additional time through IDEA procedures to come to its senses and realize that the dog would be better than just a human aide at making E.F. as independent as possible, despite the fact that allowing the school such an additional grace period might damage the bond that needed to be formed between the girl and the dog. In a suit against a Florida school board, a Florida federal district court found:

> Separation of a service animal from the target member of its team is detrimental in diminishing the animal's responsiveness and effectiveness, reducing the animal's ability to respond and perform tasks for its target, and disrupting the animal-target bond that is important to the effective working connection between members of the service dog team. . . . These negative effects carry over even when the service dog team is reconnected.

Alboniga v. School Board of Broward County Florida, 87 F.Supp.3d 1319, 1324 (S.D. Fla. 2015). Mary R. Jalongo, *Attachment Perspective on the Child-Dog Bond: Interdisciplinary and International Research Findings*, 43(5) Early Childhood Ed. J. 395, 398 (2015), argues that "[m]ore activities shared together lead to a stronger bond. . . ." *Id.* at 399. Jalongo states that "[r]elationships are established as each partner gains more information about the characteristic reactions of the other and forms reciprocal expectations for subsequent behavior. . . ." Outcomes, such as "retrieving objects for children with limited mobility . . . rely on

reciprocal attachment between child and dog." *Id.* at 400.

The relationship with the individual with a disability is likely to be the third important one in a service dog's life, which begins with a puppy raiser until the dog is at least six months old, followed by an extended relationship with a trainer or training group until the dog is over a year and perhaps two years old.[12] Probably because of the prevalence of guide dogs in many countries, most research projects on human-dog bonds involving service dogs have studied guide dogs and their users. Speaking of the relationship between guide dogs and blind masters, Sz. Naderi et al., *Co-operative Interactions between Blind Persons and Their Dogs*, 74 Applied Animal Behaviour Science 59, 78 (2001), found that "as the blind person and the guide dog is becoming accustomed to each other, many minute changes take place in their co-operative behaviour." This research team notes that as guide dog and master get to know one another, they "can invent new types of joint actions, or they can modify learned ones or omit learned behaviours that do not seem to have any advantages for them." *Id.* at 79.

The bonding process is as essential to the service dog as it is to the master, and given that the average

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[12] See Gaia Fallani et al., *Do Disrupted Early Attachments Affect the Relationship between Guide Dogs and Blind Owners?* 100 Applied Animal Behaviour Science 241, 253 (2006). The length of the training period of a service animal varies considerably by function and school. E.F.'s dog had received ten to twelve months of training. OCR Report at JA 21.

dog's life is only a fraction of the average human's life,[13] the dog's adaptation should begin as soon as possible after its training is completed.[14] Natalie Sachs-Ericsson et al., *Benefits of Assistance Dogs: A Review*, 47(3) Rehabilitation Psychology 251, 254 (2002), note that there are "four elements of the human-animal bond: *safety*, *intimacy*, *kinship*, and *constancy*." Respondents were willing to interfere with constancy in the relationship of E.F. and Wonder and appeared disapproving of the intimacy. Jozsef Topal et al., *Reproducing Human Actions and Action Sequences: "Do as I do!" in a Dog*, 9 Animal Cognition 355 (2006), studying the learning patterns of a mobility impairment dog named Philip, concluded that even though dogs have a "very different body schema to that of humans," they can nevertheless "choose the correctly matching action" to imitate a human from their "own repertoire." *Id.* at 356. This is a complicated process:

> Transferring items from one place to another may be part of the species-specific repertoire of dogs; certainly, there was no doubt that

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[13] Service dogs are frequently retired between eight and ten years of age, though dogs begin to decline in "executive function" when about eight years old. Emily Bray et al., *Context Specificity of Inhibitory Control in Dogs*, 17 Animal Cognition 15, 27 (2014).

[14] It should perhaps be noted that some service dog training programs suggest that, even before dogs are paired with end-users with disabilities, they should be taken into training facilities and schools to aid in transitions to new environments as well as to new people. See Paolo Valsecchi et al., *Development of the Attachment Bond in Guide Dogs*, 123 Applied Animal Behaviour Science, 43, 48-9 (2010) (also noting, at 50, that "repeated bond breaking" can compromise full-fledged attachments).

> Philip possessed this action routine in his repertoire before our experiment. However, carrying cannot be regarded as a simple movement pattern, but a structured framework with 'cases' or 'slots' for agent, object, and to-and from-locations. Thus, when a dog observes a human demonstrator carrying an object, it may be said to 'understand' what the other is doing if its representation includes the specific contents of each slot.

Id. at 365. In developing such a "human-relevant repertoire," Topal et al. suggest that "experience plays a substantial role either in enhancing imitative performance or in generating imitative ability." *Id.*

III. THE POLICY OF RESPONDENTS ESTABLISHING SEPARATE AND ADDITIONAL PROCEDURAL REQUIREMENTS FOR USERS OF NON-GUIDE SERVICE ANIMALS THAN THOSE PROVIDED FOR USERS OF GUIDE DOGS VIOLATES THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT.

As stated in Judge Daughtrey's dissent, "[t]he school district refused to recognize Wonder as a service dog despite his official certification, possibly because school policy explicitly allowed 'guide dogs' – but not 'service dogs' – on school premises. . . ." *Fry*, 788 F.3d at 632-33. The report of the Office for Civil Rights states:

> During its investigation, OCR reviewed the District's policy with respect to service animals (the Policy) that was provided by the District. This policy is titled "Guidelines – Office of the Superintendent, Napoleon Community Schools," with the heading "Access to Equal Educational Opportunity." The guidelines are four pages long, and only one provision, under "Facilities," discusses "guide dogs." The Policy requires students seeking to utilize a guide dog to assist the student at school facilities, events, and programs to provide evidence of the dog's certification for that purpose.

OCR Report at JA 29. This Report states that the school and the school district held "multiple meetings [but] did not acknowledge the dog was a service animal. . . ." OCR Report at JA 34. Even after the OCR Report was issued, Respondents continued to maintain that Wonder was not a service dog, as noted in Judge Daughtrey's dissent. *Fry*, 788 F.3d 637.

The school's policy, which would have automatically admitted a guide dog, had E.F.'s disability been blindness, has already been noted. As Judge Daughtrey says:

> The stupefying fact . . . is that the school district's policy would explicitly have permitted [E.F.] to have a guide dog at school if she were blind, but was not interpreted to allow the use of a service dog as a reasonable accommodation for her mobility handicap – even in the face of federal regulations establishing that any distinction between a guide dog and a service dog is purely semantic.

Fry, 788 F.3d at 637. The reason for the school having a policy specific to guide dogs, among all service dogs, is not elucidated in the record,[15] though Judge Daughtrey notes that this policy allows the school to ignore Wonder's certification, which she finds "giv[es] lie to the claim that Wonder was objectionable because he might cause allergic reactions in staff members and students or become a distraction to others." *Fry*, 788 F.3d at 632-33.

Such a rigid distinction between guide and other service dogs ignores developments in the American law of service animals, which increasingly defines the term not by subcategorizing types of service animals but rather by requiring a functional connection between a trained animal and the disability of its owner or handler. Indeed, service dogs are now often being trained to deal with combinations of disabilities, both physical and mental, that might be specific to just one individual. Thus, a mobility impairment dog might also detect and respond to seizures. A diabetic alert and response dog might help pull a wheelchair. One researcher

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[15] Mentioning only guide dogs, or only guide and signal dogs, is sometimes a legacy of the American history of the law of service animals, under which guide dogs were for decades the only animals serving such medical functions. See John J. Ensminger, *Service and Therapy Dogs in American Society* 47-48 (2010). Guide and signal dogs were the only specific types of service animals listed in the first definition of "service animal" in the Title III regulations issued in 1991. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,555, 35,594 (1991).

funded by the Department of Education's Office of Special Education and Rehabilitative Services states:

> Service animals provide support for people with disabilities at a level we could not have foreseen just decades ago. They have expanded our understanding of the variety of tasks that can be done, different types of people with disabilities who can be served, and the effect of the animal on the lives of people with disabilities.

Margaret K. Glenn, *An Exploratory Study of the Elements of Successful Service Dog Partnerships in the Workplace*, 2013 ISRN Rehabilitation 278025: 1 (2013). The 2010 revisions to the Title II and Title III regulations under the ADA both begin the definition of "service animal" by saying that this is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. . . ." 28 C.F.R. § 35.104 (2015); 28 C.F.R. § 36.104 (2015). What follows in the definitions are a series of examples, including for present purposes, "guiding individuals who are blind or have low vision, . . . pulling a wheelchair, fetching items, . . . retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, . . . [and] with navigation." *Id.* Such an approach accurately suggests that dogs can have slightly different functions for individuals with similar but not identical disabilities. The school district's guide-dog-only policy in the present case demonstrates a lack of understanding of the types of service animals that might

be trained and developed for children with a wide range of physical and mental impairments.

It is no surprise that the mobility functions of E.F.'s service dog have overlaps with the mobility functions of guide dogs.[16] The mobility functions performed by Wonder, the non-guide service dog in this case, are similar to the mobility functions performed by a guide dog, though the disabilities of the persons served differ, and those functions have no educational components properly limited or altered by teachers, aides, or a school system, or properly considered under IDEA procedures, other than recognition of the dog's presence with a child in school and its functions. Exhaustion should not be required for a non-guide service dog when it would automatically not be necessary for a guide dog. An affirmance in this case would send a message to schools and other institutions that have policies or rules giving preferences to, or only acknowledging the existence of specific types of dogs, such as guide dogs and signal dogs, that such restrictions could be maintained as a mechanism to delay the acceptance

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[16] See L. Whitmarsh, *The Benefits of Guide Dog Ownership*, 7(1) Visual Impairment Research 27, 37 (2007), noting that a "guide dog is trained at considerable expense to provide mobility assistance. " Many guide dog users have some level of "residual vision" and this and the functional abilities, requirements, and preferences of the specific owner must be taken into account in training the dog and adapting it to the owner. *Id.* at 38-9. See also Max von Stephanitz, *The German Shepherd Dog in Word and Picture* 399-400 (English ed. 1923) (discussing how guide dogs were developed by trainers of ambulance dogs, which had aid functions for both blinded and otherwise wounded and thus mobility-impaired soldiers on battlefields in World War I).

of service dogs with other functions onto school grounds or into classrooms.

CONCLUSION

Users of service animals encounter prejudices against animals, something that users of wheelchairs and walkers do not have to deal with. Schools have had to adapt to the increasingly varied and complex types of service animals, but the education of teachers and other staff members about the functions of such dogs and their importance in the lives of children should not become part of, or be allowed to interfere with, a child's use of a trained service dog and such a dog's performance of its functions for a child. That will happen if the child is merely allowed to be with the dog. An Individualized Education Program is not a learning curve for educators to become familiar with a child's use of a service animal, but rather is a plan for the child to obtain the knowledge and skills that can be given by teachers in classrooms.

The Frys had no issue with the educational programs of the Ezra Eby Elementary School. Rather, they merely wanted to follow through on the prescription of a pediatrician to obtain a service dog for E.F. so that she could use the dog everywhere it could help her, including at school. They obtained the outside assistance of therapists to help E.F. learn to work with Wonder. They asked nothing from the school in this regard, and quickly realized that the school, or at least the

school administrators, did not know and refused to understand that Wonder was a type of highly trained service animal. Indeed, the school system only accepted guide dogs for the blind as legitimate service animals. In frustration the Frys turned to the Office for Civil Rights. After a thorough analysis, this agency admonished the school system for its failure to recognize E.F.'s need for Wonder, yet the school system continued to reject OCR's findings while agreeing to take appropriate action. A school system that reacts in such a knee-jerk, uninformed manner, for over two and a half years, should not be allowed to throw up sequential and useless procedural barriers to prevent or delay a service animal from accompanying a child into a classroom.

The decision of the Sixth Circuit should be reversed.

Dated: August 26, 2016

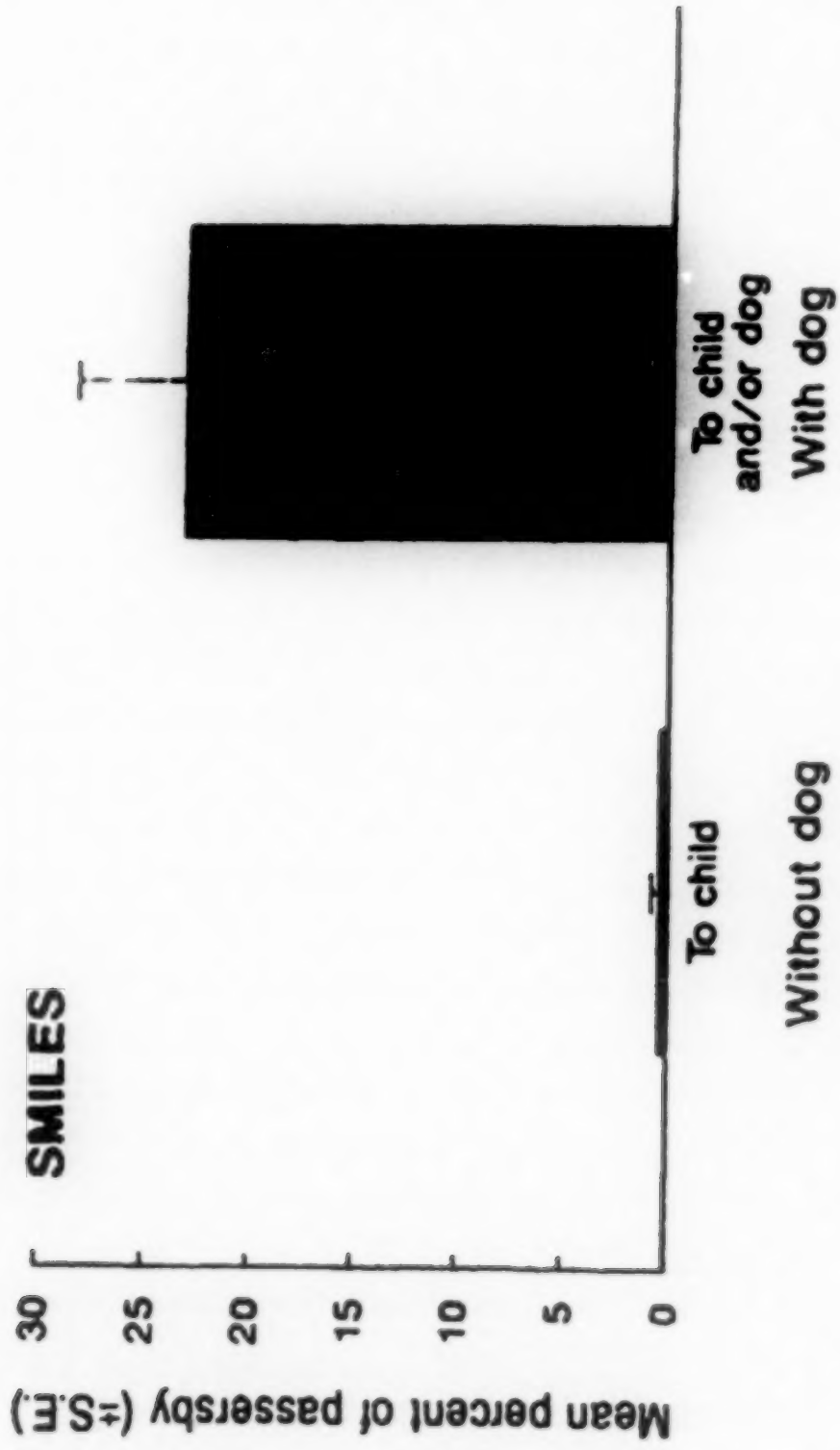
Respectfully submitted,

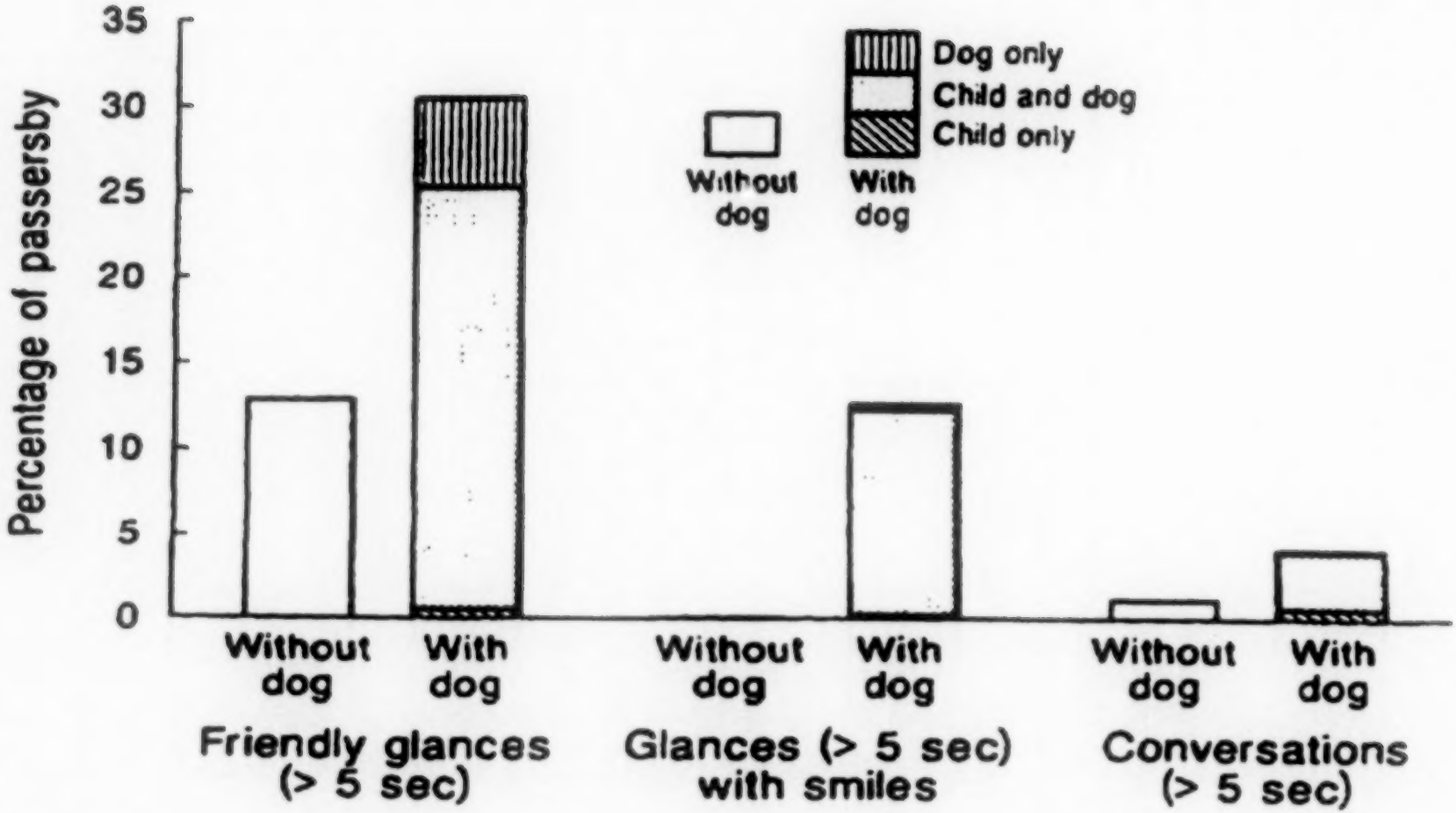
JOHN J. ENSMINGER, ESQ.
Counsel of Record
4428 Atwood Road
PO Box 675
Stone Ridge, NY 12484
(917) 613-4960
jensminger@msn.com

Attorney for Amici Curiae

APPENDIX A: Statistical Evidence of Normalizing Effect of Service Dogs

Bonnie Mader, et al., *Social Acknowledgments for Children with Disabilities: Effects of Service Dogs*, 60(6) Child Development 1529 (1989), examined whether disabled children in wheelchairs with service dogs receive more frequent social acknowledgment than when no dog is present. They recorded behaviors of people who passed children in wheelchairs in shopping malls and on school playgrounds and found that social acknowledgements of the children by friendly glances, smiles, and conversations were substantially more frequent when a service dog was present. The following two figures from their paper (reproduced with permission) demonstrate the dramatic difference in what happens when a child has a service dog, and when he or she does not:


SMILES
Mean percent of passersby (±S.E.)
30
25
20
15
10
5
0
To child
Without dog
To child and/or dog
With dog


Percentage of passersby
35
30
25
20
15
10
5
0
Dog only
Child and dog
Child only
Without dog
With dog
Without dog
With dog
Without dog
With dog
Without dog
With dog
Friendly glances (> 5 sec)
Glances (> 5 sec) with smiles
Conversations (> 5 sec)

App. 3

Id. at 1533. The first figure shows the mean percent of public passers-by offering smiles to children using wheelchairs and/or their service dogs, shown as a function of whether a service dog was present. The second figure shows the mean percent of public passers-by offering friendly glances or conversations to children using wheelchairs as a function of whether a service dog was present. Friendly glances are divided into those above and below five seconds. Children with dogs received much friendlier contacts with passers-by than children without dogs. The authors concluded that "[s]ervice dogs may assist in normalizing the social interactions for children with disabilities producing social isolation." *Id.* at 1529.

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STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* HON. LOWELL P. WEICKER, JR. IN SUPPORT OF PETITIONERS

ARLENE B. MAYERSON
DISABILITY RIGHTS
EDUCATION & DEFENSE FUND
3075 Adeline St., Ste 210
Berkeley, CA 94703
(510) 644-2555

SASHA SAMBERG-CHAMPION
Counsel of Record
MICHAEL G. ALLEN
RELMAN, DANE & COLFAX PLLC
1225 19th Street NW, Ste 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@relmanlaw.com

Attorneys for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

Lowell Palmer Weicker, Jr. served as a U.S. Representative, as a U.S. Senator, and as the 85th Governor of Connecticut. In each capacity, Senator Weicker championed the rights of people with disabilities and their families with respect to access to health, education and all other civil rights. Senator Weicker was an architect of many of the leading modern-day disability rights laws, including the Individuals with Disabilities Act (IDEA), the Handicapped Children's Protection Act (HCPA) and the Americans with Disabilities Act (ADA). In the halls of Congress, he often acted and spoke not only as a U.S. Senator but also as a parent of a child with a disability.

In particular, Sen. Weicker took the lead in drafting, introducing, and enacting the HCPA, a provision of which is at issue here. Sen. Weicker introduced the HCPA in order to ensure that the families of children with disabilities are empowered to make the choices that are best for their children and, where necessary, to file suit to redress violations of their rights pursuant to disability statutes and other laws. He included in that legislation a provision meant to ensure the continued vitality for children with disabilities of claims pursuant to Section 1983 and Section 504 of the Rehabilitation Act following

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

Supreme Court precedent suggesting that the IDEA preempted such claims.

Lower courts have, unfortunately, misconstrued certain language in that provision in a manner that turns the HCPA, which was meant to enlarge the rights and remedies available to children with disabilities and their families, into a law that instead diminishes those available rights and remedies in many instances. Accordingly, Sen. Weicker files this brief to urge this Court to construe the HCPA in accordance not only with its plain language but also with the clear intent of Congress in enacting it.

SUMMARY OF ARGUMENT

In order to make it easier for families alleging that children with disabilities have been mistreated to enforce their rights in court, Congress enacted the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796. The HCPA provided that attorney's fees are available for parties prevailing on claims brought under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. In the provision at issue here, Congress further provided that the IDEA, which guarantees a free, appropriate public education, does not limit the ability to bring suits under other laws, such as Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. 20 U.S.C. § 1415(l). As a narrow exception to that general rule, parties actually seeking remedies available under the IDEA must exhaust the IDEA's administrative process before suing, whether their suit is brought under the IDEA or another law Congress intended 20 U.S.C. § 1415(l) to *eliminate*

potential barriers to the enforcement of non-IDEA rights rather than *imposing* them.

The Petitioners here brought only non-IDEA claims and sought only relief that is not available under the IDEA. Nonetheless, the Sixth Circuit held that Petitioners' claims must be dismissed for failure to exhaust those claims through the IDEA's administrative procedures before filing suit. It broadly construed the HCPA's exhaustion requirement to apply so long as the plaintiffs *conceivably could have* filed a suit seeking remedies available under the IDEA, regardless of whether they *did* file such a suit seeking IDEA remedies.

The Sixth Circuit's holding is irreconcilable with the text Congress enacted. It also turns congressional purpose upside down. The HCPA was meant to *increase* the ability of children with disabilities and their families to sue school districts in various ways, in response to this Court's decision in *Smith v Robinson*, 468 U.S. 992 (1984). In *Smith*, this Court held, among other things, that the IDEA's predecessor law, the Education of the Handicapped Act ("EHA"), effectively preempts substantively identical claims brought under other laws in order to obtain relief (in that case, attorney's fees) not available under the EHA. In response, Sen. Weicker introduced, and Congress enacted, the HCPA. Among other things, the HCPA added what is now 20 U.S.C. § 1415(l) to clarify that the IDEA does *not* preempt lawsuits or otherwise "restrict or limit the rights, procedures, and remedies available" under other laws.

Consistent with that general principle, the provision's exhaustion requirement does not purport to

apply to claims, such as the one at issue here, that do not allege an IDEA violation or seek relief that is available under the IDEA. To the contrary: it requires exhaustion through the IDEA process of claims brought under other laws only if plaintiffs are actually "seeking relief that is also available" under the IDEA. 20 U.S.C. § 1415(l). It thus is framed to apply only to claims, such as those in *Smith*, which amount to attempts to litigate an IDEA dispute under another name and through a different process. Congress specifically considered the argument that the exhaustion requirement should apply more broadly, whenever a plaintiff potentially has a claim under the IDEA. It declined to adopt such language, yet the Sixth Circuit ruled as though it had.

The Sixth Circuit's holding here is unfaithful both to the language Congress enacted and to Congress's purposes. Indeed, the Sixth Circuit's construction has the perverse result of turning 20 U.S.C. § 1415(l), a provision meant to *ensure* the ability of children with disabilities to bring non-IDEA claims such as the ones at issue here, into one that hinders their ability to do so. That was certainly not Congress's intent. This Court should, instead, construe that provision of the IICPA consistent with its plain language as well as the legislative intent to empower the families of children with disabilities to enforce their non-IDEA rights as well as their IDEA rights.

ARGUMENT

As Petitioner correctly explains, the Sixth Circuit misreads the IDEA's narrow exhaustion requirement. The only non-IDEA claims that must be exhausted through the IDEA process are those actually "seeking relief that is also available under" the IDEA itself. 20 U.S.C. § 1415(l). There is no basis for construing that language to reach claims that do not seek relief available under the IDEA, based solely on speculation that the plaintiffs *could* have sought such relief.

Notwithstanding that clear text, various policy rationales have been suggested for why Congress might have wanted a more expansive exhaustion provision. Whatever the policy merits of those arguments, they do not remotely reflect the actual choices Congress made. Congress enacted 20 U.S.C. § 1415(l) as part of the HCPA, the purpose of which was, in the wake of *Smith*, to expand the procedural rights available to children with disabilities under both the IDEA and other laws. *Smith* itself did not impose such a broad administrative exhaustion requirement as the one that the Sixth Circuit found, and Congress certainly did not intend the HCPA to extinguish rights that *Smith* left intact.

Rather, Congress added a narrow exhaustion proviso to a provision that clarifies that the IDEA does *not* limit the right to sue under Section 504 or other laws. That exhaustion proviso is meant to apply to non-IDEA claims that closely track IDEA rights and remedies, such as the claims at issue in *Smith*. Although overruling *Smith*'s holding that such duplicative claims could not be brought at all, the HCPA required those claims to be exhausted through

the IDEA process just the same as if they had been filed under the IDEA.

Where, as here, a family brings a suit that does not allege an IDEA violation or seek relief available under the IDEA—that is, a suit that could not have been filed under the IDEA—Congress intended 20 U.S.C. § 1415(l) to clarify that the IDEA does *not* limit a family's rights or remedies in any way. Congress rejected an alternative exhaustion provision suggested by the National School Board Association that would have applied more broadly to situations where a plaintiff *could have* enforced IDEA rights and sought IDEA remedies but chose not to do so. Such a broad requirement would have been inconsistent with the overall purpose of 20 U.S.C. § 1415(l) and the HCPA more generally, which was to clarify that the IDEA is a law that protects the rights of children with disabilities and their families, not one that limits their rights and remedies under other laws. Moreover, Congress recognized that making the exhaustion requirement contingent on whether an IDEA action *could have* been filed would mire the federal courts in pointless speculation about the merits of hypothetical lawsuits.

Thus, the general rule embodied by the HCPA is that "the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir 2013). The exhaustion proviso is "an exception to the general rule" that the IDEA should not be construed to restrict non-IDEA rights and remedies. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc). Exhaustion of IDEA

remedies for non-IDEA claims is not, as the Sixth Circuit mistakenly believed, the rule itself.

Congress recognized that the IDEA's rights and remedies, although important, are not the only legal protections that children with disabilities enjoy at school. Accordingly, Congress elected to empower children with disabilities and their families to make the decision either to seek IDEA remedies—in which case they must exhaust through the IDEA process—or to forego such remedies—in which case they have no obligation to do so. That was Congress's choice, and this Court should respect it.

I. The HCPA's Narrowly Worded Exhaustion Provision Was Inspired By, And Was Meant To Address, Claims Like Those In *Smith v. Robinson* That Are Substantively Identical to IDEA Claims.

The narrowly worded exhaustion language of 20 U.S.C. § 1415(l) was inspired by the fact pattern of *Smith v. Robinson*, as well as the back and forth between the majority and dissent. Accordingly, a close reading of *Smith v. Robinson* is instructive as to the intended meaning of the words Congress chose.

Although disagreeing as to the ultimate result in that case, both the majority and dissent in *Smith* agreed that claims that were substantively identical to EHA claims could not be brought directly in federal court under other laws as a way to evade the EHA administrative process. This, and no more, was the principle that Congress ultimately codified when it added narrow exhaustion language to a provision – 20

U.S.C. § 1415(l) – that was intended to *protect* the right to bring non-IDEA claims.

Smith v. Robinson began as a quintessential IDEA dispute: a challenge to a school system's refusal to pay for the private education of a child with cerebral palsy and other disabilities. The child's parents exhausted their administrative remedies under the EHA and filed a lawsuit in the district court. They contended that the school system's actions violated the child's right to a "free, appropriate educational placement without regard to whether or not said placement can be made within the local school system." 468 U.S. at 998. Well into the litigation, the plaintiffs filed an amended complaint that added substantively identical claims under the Equal Protection Clause of the U.S. Constitution and Section 504 and sought attorney's fees as a prevailing party under those laws. *Id.* at 1000.

The plaintiffs eventually prevailed on their EHA claim. Having granted plaintiffs all the relief they sought, the district court found it unnecessary to adjudicate the merits of the plaintiffs' other claims. 468 U.S. at 1001. It nonetheless awarded attorney's fees—which were not available under the EHA—because the plaintiff's non-adjudicated claims were sufficiently colorable to make the plaintiffs prevailing parties pursuant to *Maher v. Gagne*, 448 U.S. 122 (1980). *Id.* at 1002. But the court of appeals reversed the fee award, finding that plaintiffs' unadjudicated claims were not substantial, and this Court affirmed that decision.

This Court held that Congress intended the EHA to provide the exclusive rights and procedures for challenging the failure to provide a free appropriate

public education, precluding substantively identical claims under both the Constitution, 468 U.S. at 1012, and Section 504, *id.* at 1016-17 It reasoned that, in a case "[w]here § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise unavailable damages or for an award of attorney's fees." *Id.* at 1021. Nor, it found, could Congress have intended that a plaintiff bringing what amounted to an EHA claim have "the possibility of circumventing EHA procedures and going straight to court with a § 504 claim." *Id.* at 1019. Rather, it reasoned, "there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education." *Id.*

This Court took care to "emphasize the narrowness of our holding." 468 U.S. at 1021. It did not "address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA." *Id.* Rather, it held only that where "whatever remedy might be provided under § 504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to § 504." *Id.*

Justice Brennan, joined by Justices Marshall and Stevens, dissented. Justice Brennan agreed with the majority that, "in enacting the EHA, Congress surely intended that individuals with claims covered by that Act would pursue relief through the administrative channels that the Act established before seeking

redress in court." 468 U.S. at 1023-24. But once such exhaustion has taken place, he reasoned, it would not conflict with the EHA to permit plaintiffs to bring substantively identical claims under other laws to get the benefit of additional remedies such as damages and attorney's fees. *Id.* at 1024-25.

Had Congress never passed the HCPA—if *Smith v. Robinson* were the last word governing the issues in dispute here—this Court's precedents would not have barred the Petitioners here from bringing their claims under the ADA and Section 504 without first utilizing the IDEA process. By its terms, *Smith* did not apply where, as here, the Section 504 claim neither enforces IDEA rights nor seeks remedies available under the IDEA, but rather vindicates "substantive rights greater than those available under the EHA," 468 U.S. at 1021.

It was against that background that Congress passed the HCPA, which eventually included the narrowly worded exhaustion language now at issue. As described in greater detail below, the HCPA was carefully crafted to overturn certain aspects of *Smith*. At the same time, it codified one point on which the majority and dissent agreed: that certain non-EHA claims, such as the ones at issue in *Smith*, were so duplicative of EHA claims that they had to be exhausted through the EHA process in the same manner as EHA claims. However, in describing which claims were subject to that requirement, Congress did not use the language of Justice Brennan's dissent—pursuant to which "individuals with claims covered by that Act [the EHA]" would be required to exhaust EHA procedures—nor did it adopt the National School Board

Association's broader proposed exhaustion requirement.

II. Congress Rejected A Broad Exhaustion Provision For Non-IDEA Claims And Instead Adopted A Narrow One That Is Triggered Only Where Plaintiffs Actually Seek IDEA Relief.

Just 19 days after *Smith* issued, bills were introduced in both the House and Senate to overturn the most troublesome results of that decision. *See* Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599, 612 n.91 (1987) (describing introduction of bills). Neither bill contained the exhaustion language now at issue.

In his statement introducing S. 2859, Sen. Weicker highlighted how critical it was that prevailing parties in EHA cases receive attorney's fees in order to empower parents to protect their children's rights. He also observed that the Supreme Court had misconstrued the intended relationship between the EHA and other laws protecting the rights of children with disabilities. He stated that Congress and multiple administrations had consistently assumed that the EHA and Section 504 "were intended to be free-standing, complementary—but not identical—legislative acts." 98 Cong. Rec. S9078-79 (daily ed. July 24, 1984). Moreover, Sen. Weicker observed, even if it were otherwise desirable to do so, treating the EHA as preempting the application of other laws would mire federal courts in endless disputes about whether such preemption is appropriate in particular cases. *Id.*

Sen. Stafford stated that, when Congress added an attorney's fees provision to the Rehabilitation Act in 1978, "we were concerned for the rights of all handicapped people. No exception was made for school-aged children." 98 Cong. Rec. S9103 (daily ed. July 24, 1984). He observed that the majority and dissent were correct in finding that Congress did not intend parents to "bypass" the EHA administrative system when enforcing their rights under that law, but said Congress "never envisioned" the EHA "as limiting or restricting the civil rights of handicapped children" under other laws. *Id.*

In the next congressional term, both chambers considered and eventually enacted reintroduced versions of those bills. Neither bill, as introduced, contained any exhaustion requirement.

Sen. Weicker introduced S. 415, which he explained was "a direct response to the *Smith v. Robinson* Supreme Court decision." *Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 1 (May 16, 1985) ("Senate Hearing"). In particular, it was meant to change *Smith*'s bottom line that no attorney's fees were available "to parents who, after exhausting all available administrative procedures, prevail in a civil court action to protect their child's right to a free and appropriate education." *Id.* Accordingly, the bill's most important purpose was to explicitly provide that prevailing parties under the EHA were entitled to attorney's fees. *Id.* at 2.

In the House, Rep. Pat Williams introduced a similar bill, H.R. 1523, 99th Cong. (1985). He also

stated that the predominant purpose of that bill was to provide for recovery of attorney's fees by parents who prevail on EHA claims. 131 Cong. Rec. E827-01 (Mar. 7, 1985); *Handicapped Children's Protection Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 99th Cong., 1st Sess. 7 (Mar 12, 1985) ("House Hearing").

As a secondary matter, the original version of both bills also clarified—in language that now constitutes the main clause of 20 U.S.C. § 1415(l)—that the EHA should not "be construed to restrict or limit the rights, procedures, and remedies available" under other laws. This provision was meant to restore the prevailing understanding, prior to *Smith*, that the EHA did not implicitly repeal rights and remedies available under Section 504. Such "rights, procedures and remedies" included not only the ability to seek damages but also the right to file a complaint with the Department of Education's Office of Civil Rights ("OCR"). In introducing the Senate bill, Sen. Weicker stated regarding this provision: "As a result of this clarification there will be no question about the commitment of Congress to guarantee to handicapped children the civil rights which are available to the rest of our country's citizens." 131 Cong. Rec. S1151-01 (Feb. 6, 1985).

Thus, 20 U.S.C. § 1415(l) was introduced in both chambers as a provision that *protects* the right of children with disabilities and their families to pursue non-EHA remedies. The exhaustion language now at issue was added as a proviso to those protections—a narrowly worded exception to the general rule. The National School Board Association ("NSBA") requested

a broader provision that would have required exhaustion of IDEA claims in any case where a plaintiff *could have* enforced IDEA rights and sought IDEA remedies—even if the plaintiff had chosen not to seek such IDEA remedies—but Congress rejected NSBA's approach.

The NSBA argued that claims enforcing the EHA right to a free appropriate public education should require exhaustion through the EHA process, regardless of whether they were brought under the EHA. For example, before the Senate, NSBA argued that, because "parents of handicapped students who are asserting claims of a violation of their right to a free appropriate public education are fully protected by EHA," it would be unnecessary and counterproductive to permit them to bring Section 504 claims alleging such violations outside the strictures of the EHA process. Senate Hearing at 74. For such claims, the NSBA argued, "by not requiring plaintiffs to exhaust the remedies of EHA, the EHA process itself is weakened." *Id.* at 75.

Similarly, before the House, an NSBA representative expressed the same concern about claims under other laws that simply enforced the EHA right to a free appropriate public education:

> If Section 504 is simply a superfluous claim that adds nothing to a handicapped child's substantive right to a free appropriate public education, then handicapped plaintiffs should be limited to seeking relief under the EHA. To provide otherwise would allow handicapped plaintiffs to forego the administrative

> procedures in the EHA and file a complaint, either with OCR or a court, under Section 504.

House Hearing at 27 (testimony of Jean Arnold).

To remedy this problem, the NSBA asked Congress to add an exhaustion requirement that would apply not only to plaintiffs who *actually* sought to enforce EHA rights, but also to plaintiffs who *could have* done so. Specifically, it asked for a provision stating that Section 504 claims could be brought "only where the EHA does not protect the rights of and provide remedies to the handicapped individual." House Hearing at 27 (testimony of Jean Arnold). In support of this proposal, the NSBA cited with approval Justice Brennan's statement that "a plaintiff with a claim covered by the EHA" should be required "to pursue relief through the administrative channels established by that Act before seeking redress in the courts" under another law. Senate Hearing at 75 (quoting *Smith v. Robinson*, 468 U.S. at 1024 (Brennan, J., dissenting)).

In response to the NSBA's concerns, the Senate and House both added the exhaustion clause now at issue in essentially the same form in which it eventually was enacted. Congress did not, as urged by the NSBA, require exhaustion whenever the IDEA "protect[s] the rights of and provide[s] remedies to the handicapped individual." Housing Hearing at 27. Instead, it required exhaustion only when a plaintiff actually seeks remedies available under the IDEA.

Congress understood well the meaning of the words it chose, not only because it was rejecting the alternative proposed by the NSBA, but also because it was reacting to language in *Smith v. Robinson*. In

Smith v. Robinson, the plaintiffs (after exhausting their EHA remedies) eventually pleaded non-EHA claims that sought both remedies available under the EHA and remedies unavailable under that law. The *Smith v. Robinson* majority repeatedly found it problematic that the plaintiffs in that case pleaded non-EHA claims in order to obtain remedies that were not available under the EHA. *See, e.g.*, 468 U.S. 1019-20 (permitting Section 504 claim raised "the possibility of a damages award in cases where no such award is available under the EHA"); *id.* at 1021 (Section 504 claim used to seek "otherwise unavailable damages"). In response, Congress crafted 20 U.S.C. § 1415(l), which makes it clear that the IDEA poses no barrier at all to claims seeking relief unavailable under the IDEA, but does require exhaustion of claims seeking relief available under the IDEA.

Both the Senate and House committee reports reflected a common understanding that, notwithstanding this amendment, the HCBA would ensure "the viability of section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 99-296, at 4 (1985) ("House Report"). Both reflected Congress's understanding that, consistent with the actual language of the exhaustion provision, exhaustion would only be required with respect to suits actually seeking relief available under the EHA, such that those suits could have been brought under the EHA itself.

The House Report stated that "before going to court, parents or guardians *seeking relief that is also available under EHA* must exhaust administrative remedies available under EHA to the same extent as

would be required had the action been brought under EHA." House Report at 7 (emphasis added). It then reiterated: "In other words, parents alleging violations for section 504 and 42 U.S.C. § 1983 are required to exhaust administrative remedies before commencing actions in court where exhaustion would be required under EHA *and the relief they seek is also available under EHA*." *Id.* (emphasis added). In practice, this meant that "a parent is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." House Rep. at 7 And even then exhaustion would not be required where doing so would be futile – including where "the hearing officer lacks the authority to grant the relief sought" – or where the challenge was to an illegal policy or "practice of general applicability" rather than a decision limited to an individual child. *Id.*

As he brought the bill to the House floor, Rep. Williams highlighted the predominant purpose of 20 U.S.C. § 1415(l): "reestablishing the viability of Section 504 of the Rehabilitation Act of 1973 and other statutes as separate vehicles for ensuring the rights of handicapped children and youth." 131 Cong. Rec. H9964-02 (Nov 12, 1985). Neither he nor any member of the House suggested that the exhaustion clause was anything more than a narrow exception to that broad rule.

The Senate report reflected a similar understanding that the exhaustion requirement was triggered by full overlap between the actual suit brought and EHA remedies, not by the possibility that a different suit

could have been brought that would implicate EHA remedies. It stated that exhaustion was required "when a parent brings suit under another law *when that suit could have been brought under the EHA*." S. Rep. No. 99-112, 99th Cong., 1st Sess. 3 (1985); *accord id.* at 12 (exhaustion required "when a parent brings suit under another law when *that suit* could have been brought under the EHA") (emphasis added); *accord id.* at 15 ("if *that suit* could have been filed under the EHA, then parents are required to exhaust administrative remedies to the same extent as would have been necessary if the suit had been filed under the EHA") (emphasis added).

In subsequently describing S. 415 on the Senate floor, Sen. Weicker stated that the bill's purpose was "simple – to overturn the *Smith v. Robinson* decision," particularly with respect to the availability of attorney's fees for EHA claims but also with respect to the suggestion that the EHA could preempt rights and remedies available under other laws. 131 Cong. Rec. S10396-01 (July 30, 1985). He observed that, as a result of *Smith v. Robinson*, "handicapped children are now provided substantially less protection against discrimination than other vulnerable groups of people," and his bill "would remove these inequities by restoring equivalent protection to handicapped children." Sen. Kennedy added that S. 415 "clearly" provided that "the educational rights of handicapped children are protected from discrimination under Section 504 of the Rehabilitation Act and other civil rights statutes." *Id.*

Sen. Simon addressed the exhaustion clause at the greatest length, and essentially reiterated the understanding set forth in the Senate report. He

stated: "When parents choose to file suit under another law that protects the rights of handicapped children, if *that suit* could have been filed under the Education of the Handicapped Act, parents are required to exhaust the administrative remedies to the same extent as would have been necessary if the suit had been filed under the Education of the Handicapped Act." *Id.* (emphasis added). As did the Senate report, he observed that exhaustion would not be necessary "where the hearing officer lacks the authority to grant the relief sought." *Id.*

Conferees from the two chambers met to reconcile various disagreements between the two bills, none of which is material to the issue before this Court. In subsequently introducing the conference report on the House and Senate floors, lawmakers continued to express their understanding of the HCPA as intended to *expand* the rights of children with disabilities and their parents following *Smith*, not to diminish them in any way

As Sen. Weicker stated: "In adopting this legislation, we are rejecting the reasoning of the Supreme Court in *Smith v. Robinson*, and reaffirming the original intent of Congress that the educational rights of handicapped children and their parents shall not go unprotected." 132 Cong. Rec. S9277-01 (July 17, 1986). Sen. Simon added that the HCPA was meant, among other things, to reject the idea that the EHA "superseded and eliminated rights previously enacted under other laws." *Id.*

III. This Court Should Construe 20 U.S.C. § 1415(l) Consistent With Congress's Intent To Expand, Not Diminish, the Right to Bring Non-IDEA Claims.

In sum, there can be no question that 20 U.S.C. § 1415(l), like the larger bill of which it was a part, was intended to *expand* the ability of children with disabilities to bring non-IDEA claims, not *diminish* such rights. The predominant aim of that provision was to restore the general rule that "the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others." *K.M. ex rel. Bright*, 725 F.3d at 1097 The provision's exhaustion requirement is worded narrowly, and for good reason – it is "an exception to the general rule" that the IDEA should not be construed to restrict non-IDEA rights and remedies. *Payne*, 653 F.3d at 872.

The Sixth Circuit misconstrued the narrowly worded requirement to exhaust certain non-IDEA claims through the IDEA process as though it were the rule, rather than the exception. This construction is not simply inconsistent with Congress's intent – it gives 20 U.S.C. § 1415(l) an effect that is the opposite of what Congress intended. It turns a provision meant to *restore* the right to bring non-IDEA claims into one that *reduces* that right even more than did *Smith v. Robinson*. And it construes the exhaustion requirement as though Congress enacted the NSBA's proposed language, even though Congress declined to do so.

The lower court reached that erroneous result in part because it considered only the exhaustion clause of 20 U.S.C. § 1415(l). It did not consider the full sentence to which that clause is a mere proviso, let

alone the purposes of Congress in enacting the broader HCPA. As this Court regularly observes, in construing statutory provisions, courts "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). A court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). Here, the Sixth Circuit did not merely ignore the larger statutory purpose, it did not even consider the text of the full provision.

Whatever the policy merits might be of a decision to force all disputes that children with disabilities and their families may have with schools into the IDEA administrative process, that does not remotely resemble the choice Congress made when enacting the HCPA. The bill's language is not naturally read to have such a capacious exhaustion requirement, and no member of Congress understood or intended the bill to have that effect. Surely it would not have gone unnoticed if 20 U.S.C. § 1415(l), which was mentioned at every legislative step as a provision meant to ensure that the non-IDEA rights and remedies of children with disabilities would not be held preempted by the IDEA, had transformed into one with the opposite effect. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Congress made a different decision about the relationship between the IDEA and other laws protecting the rights of children with disabilities, one that is incompatible with the Sixth Circuit opinion here. It could have simply overruled the result of *Smith v. Robinson* by making attorney's fees available for prevailing IDEA plaintiffs. But Congress went further, also providing explicitly that it is improper to construe the IDEA as limiting rights and remedies guaranteed by other laws. And it rejected the NSBA's invitation to require exhaustion of claims under Section 504 and other laws unless plaintiffs could demonstrate that they had no protections available to them under the IDEA.

Congress understood that, fundamental as the IDEA's guarantee of meaningful education is for children with disabilities, it does not represent the entire sum of their rights and remedies vis-à-vis their schools or their education, and so it is inappropriate to force such children and their families to use the IDEA process to vindicate all such rights. A family that relies at times on the rights guaranteed by the IDEA does not thereby shed its rights guaranteed under other laws or the ability to enforce them outside the IDEA process. Rather, the choice remains at all times with that family to decide whether to pursue IDEA remedies or, as the Fry family did here, to forego whatever such remedies may have been available.

First of all, students with disabilities may have claims that relate tangentially, if at all, to their disabilities. For example, official conduct may violate the constitutional rights (or other generally applicable rights) of children with disabilities just the same as

with respect to any other children. Children with disabilities, like children without disabilities, may face unconstitutional discipline, First Amendment infringement, or other violations. While it may be conceptually possible to address some such violations within the IDEA framework, the IDEA is not meant to leave children with disabilities *worse* off, by preempting their general rights and remedies or by imposing procedural obstacles that would not apply to other children bringing the same claim. *See Payne*, 653 F.3d at 877 ("If the school's conduct constituted a violation of laws other than the IDEA, a plaintiff is entitled to hold the school responsible under those other laws."); *id.* at 878-79 ("If a disabled student would be able to make out a similarly meritorious constitutional claim—one that need not reference his disability at all—it is odd to suggest that the IDEA would impose additional qualifications to sue, simply because he had a disability ").

Moreover, disability-specific legal protections often exceed those rights guaranteed by the IDEA. As individuals with disabilities integrate into every aspect of society, our laws now explicitly recognize their right to an equal opportunity to participate in the public sphere—including, but not limited to, in educational settings. Most notably, Congress enacted the landmark Americans with Disabilities Act of 1990. That law, along with its implementing regulations, sets the ambitious goal of providing full equality *See, e.g.*, 42 U.S.C. § 12132 (no qualified individual with disability may be "denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

As this case illustrates, children with disabilities have enforceable rights against their schools under the ADA or related laws that do not track, and often exceed, the IDEA's protections. For example, certain accommodations may be sufficient to provide a deaf child with a free appropriate public education, and thus satisfy the IDEA, but that does not necessarily suffice to provide that child with the full equality mandated by the ADA. *See K.M. ex rel. Bright*, 725 F.3d at 1097 So, too, a person such as petitioner may have a right to a service animal in a variety of public spaces – including but not limited to schools – that has little or nothing to do with the right to a free appropriate public education. Or a child with a disability may get treated in nakedly discriminatory fashion. Once again, even assuming that the rights thus violated may overlap sufficiently with those rights guaranteed with the IDEA that it is sometimes possible for the IDEA administrative process to address these claims to some extent, Congress did not *require* parents to go that route. To the contrary, in the HCPA, Congress explicitly clarified both that the IDEA does not limit rights and remedies available under other laws and that it is a family's decision whether to pursue remedies available under the IDEA and thus have to exhaust the IDEA administrative procedures.

This case illustrates well the wisdom of Congress's choice. A school district's refusal to allow a child with a disability to use her service dog implicates both IDEA rights and non-IDEA rights, but does so very differently. such that the school district can satisfy its IDEA obligations and still violate the ADA. And even if some aspect of such a controversy could be adjudicated within the IDEA framework, *requiring*

parents and children to do that in *all cases*—whether or not they actually want any relief available under the IDEA—seriously infringes not only their litigation rights but also their freedom to make educational choices. It also mires courts in difficult and unnecessary adjudication concerning the viability of non-existent IDEA claims.

After initially pursuing a modification to E.F 's IEP—*i.e.*, attempting to protect E.F 's rights within the IDEA process—the Frys chose first to homeschool E.F and then to enroll E.F in a different, more accommodating district. Because E.F has not been enrolled in the district for some time and has no present intent to return, as the Sixth Circuit acknowledged, it is not obvious how the Frys *could* pursue IDEA administrative remedies even if they wanted them. Pet. App. 17 Accordingly, the Frys seek only money damages for the district's past conduct, a remedy that is not "also available under" the IDEA, 20 U.S.C. § 1415(l).

Nonetheless, the Sixth Circuit found the family's non-IDEA claims barred for failure to exhaust remedies that may not even be available, largely because it was the Frys' educational decisions that foreclosed the possibility of IDEA relief. It felt constrained to reach this result because it feared plaintiffs otherwise would "evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief." Pet. App. 18.

The Sixth Circuit correctly noticed that an exhaustion doctrine based on what claims *could* be filed is subject to manipulation, but it drew the wrong conclusion from that fact. It should have recognized

this as a reason that Congress declined to enact such a rule. Instead, in an attempt to discourage evasion of the IDEA administrative process, it found that the Frys—by making educational choices in the best interests of their child—thereby forfeited their claims for damages or other non-IDEA relief brought under other laws, since they no longer could exhaust such claims through the IDEA process.

This unjust result completely upends Congress's intent. The IDEA in general, and the HCPA more specifically, are meant to expand the rights and remedies available to children with disabilities and their families, not to hamstring their ability to make educational choices and put them to difficult decisions not faced by families not covered by the IDEA. Congress enacted the narrow exhaustion language of 20 U.S.C. § 1415(l) to prevent actual, live IDEA claims from being dressed up as something else, not to punish families for pursuing the educational paths they think best for their children because those educational choices might "render the dispute moot for purposes of IDEA relief." Pet. App. 18.

Moreover, under the Sixth Circuit's reading, 20 U.S.C. § 1415(l) sets a trap for the unwary that empowers lawyers rather than parents. Under that reading, school officials will be incentivized to conjure up novel IDEA claims that a family could have brought (but did not), while lawyers for children with disabilities are in the uncomfortable position of advocating against the availability of such claims. Congress intended the HCPA to make it *easier* for families to navigate the IDEA process and protect their rights under the IDEA and other laws. It did not intend

to create endless opportunities for school lawyers to construct procedural hurdles to block courts from reaching the merits of claims that school districts have violated the rights of children with disabilities and their families.

As Sen. Weicker presciently observed following *Smith v. Robinson*, construing the IDEA to preclude claims under other laws inevitably creates "an enormous number of disputed court cases" about whether such preclusion is appropriate. 98 Cong. Rec. S9078-79 (daily ed. July 24, 1984). *Smith v. Robinson*'s reasoning thus was not only unjust to affected families, it was "unworkable" for the judicial system. *Id.*

Accordingly, Congress narrowly worded the exhaustion provision of 20 U.S.C. § 1415(l) to be triggered only when families are actually "seeking" relief available under the IDEA. This standard is simple to apply, as it does not require speculation as to the viability of hypothetical alternative claims. It also empowers families of children with disabilities, by allowing them to make the choices that either trigger the exhaustion requirement or do not. Families can enforce against a school district the specific rights and remedies conferred by the IDEA, in which case they must exhaust the IDEA's administrative processes no matter what law they cite. Alternatively, they can choose to forego their IDEA rights and remedies against that district—whether by pleading a complaint that does not seek such remedies, or through educational choices made on the ground that render such remedies unavailable—in which case the IDEA does not stand in the way of whatever distinct remedies they might have under other laws.

That was the decision Congress made, as reflected in clear statutory language as well as authoritative legislative history. This Court should respect Congress's choice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

SASHA SAMBERG-CHAMPION
Counsel of Record
MICHAEL G. ALLEN
RELMAN, DANE & COLFAX PLLC
1225 19th Street NW, Ste 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@relmanlaw.com

ARLENE B. MAYERSON
DISABILITY RIGHTS
EDUCATION & DEFENSE FUND
3075 Adeline St., Ste 210
Berkeley, CA 94703
(510) 644-2555

Attorneys for Amicus Curiae

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